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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962.

Docket No. [redacted]

GENERAL ELECTRIC COMPANY,
Petitioner,

against

JAMES B. CAREY, as President of International Union of Electrical, Radio and Machine Workers, AFL-CIO,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

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INDEX.

	PAGE
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Statutes Involved	3
Statement of Case	4
The Grievances	8
Decisions of the Courts Below	11
Reasons for Granting the Writ	16
Argument in Support of Reasons:	
1(a)i —On the question whether compliance with contractual conditions precedent to arbitration are to be determined by the Court or the arbitrator, the decision of the Court of Appeals is in conflict with decisions of the United States Courts of Appeals for the First and Seventh Circuits, and with District Court decisions in the Eighth, Ninth and Tenth Circuits	17
ii —The Court of Appeals decision referring to the arbitrator questions of compliance with contractual conditions precedent to arbitration is in conflict with decisions of this Court and has impaired the obligation of contract	19
(b) —On the question whether a court should direct arbitration of a matter in the face of a contract providing that no arbitra-	

PAGE

for shall have authorization to decide such matter, the decision of the Court of Appeals has misinterpreted the decisions of this Court and is in conflict with a decision of the New York State Court of Appeals 20

2 —On the question whether the Court may direct arbitration of representation disputes including the scope of a bargaining unit under a National Labor Relations Board certification, the decision of the Court of Appeals is in conflict with decisions of the United States Court of Appeals for the First Circuit, the New York State Court of Appeals and with District Court decisions in the Third, Seventh, Ninth and Tenth Circuits 23

3 —The decision of the Court of Appeals raises other important questions of Federal Law 25

Conclusion 27

TABLE OF CASES.

	PAGE
Association of Westinghouse Salaried Employees v. Westinghouse Electric Corp., 188 F. Supp. 225 (W. D. Pa. 1959), affirmed 283 F. 2d 93 (3d Cir. 1960)	17
Atkinson v. Sinclair Refining Co., 370 U. S. 238 (1962)	19, 21
Board of Education [Heckler Elec. Co.], 7 N. Y. 2d 476, 199 N. Y. S. 2d 649 (1960)	18
Boston Mutual Life Insurance Co. v. Insurance Agents International, 258 F. 2d 516 (1st Cir. 1958)	17
Brass & Copper Workers v. American Brass Co., 272 F. 2d 849 (7th Cir. 1959), cert. den. 363 U. S. 845 (1960), petition for rehearing denied, 364 U. S. 856 (1960)	17
Carey v. Westinghouse, 11 N. Y. 2d 452 (1962)	22, 24
Charles Dowd Box Co. v. Courtney, 368 U. S. 502 (1962)	22
Chauffeurs, Teamsters and Helpers Local Union No. 795 v. Yellow Transit Freight Lines, etc., 370 U. S. 711 (1962)	21
Drake Bakeries, Incorporated v. Local 50, 370 U. S. 254 (1962)	21
Freight Drivers Local 557, IBT v. Quinn Freight Lines, 195 F. Supp. 180 (D. Mass. 1961)	23
General Tire & Rubber Co. v. Local 512, United Rubber Workers of America, AFL-CIO, 191 F. Supp. 911 (1961)	18
Grocery & Food Products Warehouse Employees, Local 738 v. Thomson & Taylor Spice Co., ... F. Supp. ..., 46 CCH Lab. Cas. ¶18, 103 (N. D. Ill., filed Feb. 13, 1963)	18

PAGE

In re American Bustines Inc., 151 F. Supp. 877 (D. Neb. 1957) 24

International Union v. *Metal Polishers*, 180 F. Supp. 280 (S. D. Cal. 1960) 24

International Union of Electrical Workers v. *Remington Rand*, 19 Misc. 2d 829, 191 N. Y. S. 2d 880 (Sp. Term N. Y. Co. 1959) 18

International Union of Electricians v. *Westinghouse Elec. Co.*, 268 F. 2d 352 (3rd Cir. 1959) 22

International Union of Operating Engineers v. *Monsanto Chemical Co.*, 164 F. Supp. 406 (W. D. Ark. 1958) 18

Jefferson City Cabinet Company v. *Electrical Workers*, 313 F. 2d 231 (6th Cir. 1963) 17

Livingston v. *John Wiley & Sons, Inc.*, ... F. 2d ..... 52 LRRM 2223 (2nd Cir. 1963) 18

Local 6, Chemical Workers v. *Olin Mathieson Corporation*, 202 F. Supp. 363 (S. D. Ill. 1962) 24

Local 1505 International Bh'd of Elec. Workers v. *Local 1836 International Ass'n of Machinists*, 304 F. 2d 865 (1st Cir. 1962) cert. granted 31 U. S. L. Week 3171 (Nov. 19, 1962) 23, 24

Local 1357 Retail Clerks v. *Food Fair Stores*, 202 F. Supp. 322 (E. D. Pa. 1961) 24

Local 174, Teamsters v. *Lucas Flour Co.*, 369 U. S. 95 (1962) 22, 25, 26

Menasco Mfg., 129 NLRB 627 (1960) *mod.* (*NLRB* v. *AAM*) 279 F. 2d 761 (9th Cir. 1960) 10

National Labor Relations Board v. *Weyerhaeuser Co.*, 276 F. 2d 865 (7th Cir. 1960), cert. den. 364 U. S. 879 24

Pacific Northwest Bell Telephone Company v. *Communication Workers of America*, 310 F. 2d 244 (9th Cir. 1962) 21

Philadelphia Dress Joint Board v. *Sidele Fashions, Inc.*, 187 F. Supp. 97 (E. D. Pa. 1960) 18

PAGE

Radio Corp. of America v. *Association of Professional Engineering Personnel*, 291 F. 2d 105 (3d Cir. 1961) 17; 22

Southwestern New Hampshire Transportation Company v. *Durham*, 102 N. H. 169, 152 A. 2d 596 (1962) 18

Sunnyvale Westinghouse Salaried Employees Association v. *Westinghouse Electric Corporation*, 175 F. Supp. 685 (W. D. Pa. 1959) aff'd 276 F. 2d 927 (3rd Cir. 1960) 23

Truck Drivers v. *Grossbaums & Petersen*, 209 F. Supp. 164 (D. Kan. 1962) 18

Textile Workers v. *Lincoln Mills*, 353 U. S. 448 (1957) 26

Underwood Corporation v. *Local 267, International Union of E. R. & M. Workers*, 183 F. Supp. 205 (D. Conn. 1960) 23

United Brick & Clay Workers v. *Gladding, McBean & Co.*, 192 F. Supp. 64 (S. D. Calif. 1961) 18

United Cement Workers International Union, AFL-CIO v. *Allentown-Portland Cement Co.*, 163 F. Supp. 816 (1958) 18

United Steelworkers v. *American Manufacturing Co.*, 363 U. S. 564 (1960) 11, 21

United Steelworkers v. *Enterprise Wheel & Car Corp.*, 363 U. S. 593 (1960) 11, 21

United Steelworkers v. *Warrior & Gulf Navigation*, 363 U. S. 574 (1960) 11; 14; 15, 21

Vulcan-Cincinnati, Inc. v. *Steelworkers*, 173 N. E. 2d 709 (Ohio App. 1960) 18

STATUTES.

Labor Management Relations Act 1947,
Section 9(b) 61 Stat. 143, 29 U. S. C. 159 (b) 3, 23

Labor Management Relations Act 1947,
Section 301(a) 61 Stat. 156; 29 U. S. C. 185(a) 3, 4, 25

TEXTS.

PAGE

2 Beale,
Conflict of Laws §346.2 26

Goodrich,
Conflict of Laws (3rd Ed. p. 340) 26

62 Harv. Law Rev.,
647, 649 (1949) 26

Index to Appendix.

Opinion and Order of the District Court for the Southern District of New York A-1

Opinion of the United States Court of Appeals for the Second Circuit A-36

Judgment of the United States Court of Appeals for the Second Circuit A-61

IN THE

Supreme Court of the United States

OCTOBER TERM, 1962.

Docket No.

GENERAL ELECTRIC COMPANY,

Petitioner,

against

JAMES B. CAREY, as President of International Union of Electrical Radio and Machine Workers, AFL-CIO,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

Petitioner, General Electric Company, prays that a writ of certiorari issue to the United States Court of Appeals for the Second Circuit for a review of the judgment entered on March 11, 1963.

Opinions Below.

The opinion and order of the United States District Court, Southern District of New York, are reported at F. Supp. 50 LRRM 2119 (1962) and are printed at pages A-1, 3, Appendix. The opinion of the Court of Appeals, modifying the order of the District Court with a direction that all grievances be submitted to arbitration, is reported at F. 2d 52 LRRM 2662 (1963) and is printed at page A-36, Appendix.

Jurisdiction.

The judgment sought to be reviewed was entered on March 11, 1963 (p. A-61, Appendix).

The statutory provision conferring jurisdiction on this Court is found at 62 Stat. 928; Title 28 U. S. C. §1254(1).

Questions Presented.

1. Whether under a collective bargaining agreement providing, among other things, that if either party denies that a grievance raises arbitrable issues the matter can proceed to arbitration only after a "final judgment" of a Court has determined that the grievance upon which arbitration has been requested raises arbitrable issues and has directed arbitration of such issues"

> (a) compliance *vel non* with contractual conditions precedent to arbitration is to be determined by the Court or the arbitrator, and whether
>
> (b) the Court may direct arbitration where the relief sought will establish or modify a wage, salary, piece rate, or job classification or decide the appropriate classification of an employee despite a clause in the arbitration article of the collective bargaining agreement which provides "[N]o arbitrator shall have the authority to establish or modify any wage, salary or piece rate, or job classification, or authority to decide the appropriate classification of any employee"?

2. Whether the Court may direct arbitration of an issue as to the scope of the bargaining unit under a National Labor Relations Board certification; whether the jurisdiction granted the National Labor Relations Board over such representation disputes overrides that conferred on the courts by Section 301 of the Labor Management Relations Act?

3. Whether the Court may direct arbitration of a grievance where the relief requested is a violation of law?

4. Whether the Court may in a proceeding under Section 301 of the Labor Management Relations Act to compel arbitration, deny effect to a contract clause which provides that the parties' "[a]greement and its interpretation shall in all respects be governed by the law of the State of New York"?

Statutes Involved.

Labor Management Relations Act, 1947, Section 301 (a), 61 Stat. 156, 29 U. S. C. 185 (a):

> "Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties."

Labor Management Relations Act, 1947, Section 9(b), 61 Stat. 143, 29 U. S. C. 159(b).

> "The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this subchapter, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof: *Provided*, That the Board shall not (1) decide that any unit is appropriate for such purposes if such unit includes both professional employees and employees who are not professional employees unless a majority of such professional employees vote for inclusion in such unit; or (2) decide that any craft unit is inappropriate for such purposes on the ground that a different unit has been established by a prior

Board determination, unless a majority of the employees in the proposed craft unit vote against separate representation or (3) decide that any unit is appropriate for such purposes if it includes, together with other employees, any individual employed as a guard to enforce against employees and other persons rules to protect property of the employer or to protect the safety of persons on the employer's premises; but no labor organization shall be certified as the representative of employees in a bargaining unit of guards if such organization admits to membership, or is affiliated directly or indirectly with an organization which admits to membership, employees other than guards."

Statement of Case.

A. The Proceeding.

Respondent, an unincorporated labor organization, moved to compel the arbitration of twelve[1] grievances between members of various locals of Respondent and Petitioner. Action was originally commenced in the New York State Supreme Court by service of a verified petition and notice of motion. It was removed to the Federal District Court by Petitioner (28 U. S. C. §§ 1441, 1446). The District Court had jurisdiction of the case under Section 301(a) of the Labor-Management Relations Act of 1947, 61 Stat. 156, 29 U. S. C. §185(a).

Petitioner contested arbitrability of each grievance on various grounds, including Respondent's failure to comply with contractual conditions precedent of the grievance and arbitration provisions, express contractual exclusions of certain grievances from arbitration, preclusion of certain grievances from arbitration because of the paramount jurisdiction of the National Labor Relations Board and non-

[1] The petition contains fourteen grievances, but two (National Docket Nos. 4142 and 3996) were eliminated during the course of the proceeding.

arbitrability of one grievance because the relief requested is violative of law.

B. The Arbitration Agreement.

The collective bargaining agreement between Petitioner and Respondent was developed over the course of many years of bargaining, not only with Respondent but with a substantial number of other unions. The arbitration provisions in all of these agreements were drawn with the manifest and express purpose of strictly limiting the matters that could be submitted to arbitration and are balanced by a limited no-strike clause. They thus are far removed from the "standard" arbitration clause which envisages arbitration of *all* grievances arising during the term of the agreement balanced against an all-inclusive no-strike clause.

1. The agreement provides [Article XV 3] that "any grievance which remains unsettled after having been fully processed pursuant to the provisions of Article XIII, and which involves . . .

> (a) the interpretation or application of *a provision of this Agreement* . . . shall be submitted to arbitration. . . ." (Italics ours)[2]

It adds [Article XV 3(a)]: ". . . *provided that no arbitrator shall have any authority* to add to, detract from, or in any way alter the *provisions of this Agreement*" (Italics ours).

The agreement also expressly provides [Article XV 2(b)] that arbitration can proceed if the right thereto is contested ". . . *only after a final judgment of a Court has determined that the grievance upon which arbitration has been requested raises arbitrable issues and has directed arbitration of such issues* . . ." (Italics ours).

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[2] Article XV 1(b) provides for arbitration of disciplinary penalties, but this section of the agreement is not at issue here.

Thus Article XV is restrictive in intent and emphasizes that the question whether a grievance—as a matter of law—fits within the sharply defined area prescribed by the Article is for the Court to decide.

2. In addition the parties have expressly excluded from arbitration certain types of disputes. Specifically—

> "(b) *It is specifically agreed that no arbitrator shall have the authority* to establish or modify any wage, salary or piece rate, or job classification, or authority to decide the appropriate classification of any employee . . ." [Article XV 3(b), italics ours].[3]

3. By reference to Article XIII, Grievance Procedure, it is readily apparent that a grievance can be filed on *any* matter, subject only to the provisions of Article XXVII (R. 82a).[4] But the grievances subject to arbitration are the much narrower class defined by the contract.

Thus compliance with the procedural provisions of the contract is a condition precedent to arbitration of those grievances which otherwise qualify for this forum. The Respondent failed to comply with a number of these procedural steps called for by the contract.

4. *The parties further limited the scope of arbitrable matters by establishing express time periods which must be met if a matter is to qualify for arbitration.*

(i) Article XV (1) (R. 80a) provides that a grievance which meets the threshold test of arbitrability—

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[3] In addition, certain other matters, including the provisions of the Insurance and Pension Plans, are excluded from arbitration [Article XV 3(c)]. This exclusion is not applicable in the instant case.

[4] References preceded by the letter R refer to the Record on Appeal in the Court below, copies of which have been filed herewith.

"... interpretation or application of a provisions of this Agreement . . . shall be submitted to arbitration . . . provided such request is made within 30 days after the final decision of the Company has been given to the Union pursuant to Article XIII, Section 2(c). . . ."

(ii) The second test—and one coupled with the 30-day limit—is the requirement in Article XV 2(a) (R. 80a) that

"Within 10 days following a written request for arbitration of a grievance, the Company or the Union may request the American Arbitration Association to submit a panel of names from which an arbitrator may be chosen. In the selection of an arbitrator and the conduct of any arbitration, the Voluntary Labor Arbitration Rules of the American Arbitration Association shall control. . . ."

5. Article XV 4 of the Agreement (R. 82a) provides:

"This Agreement and its interpretation and application shall in all respects be governed by the law of the State of New York."

Thus from the foregoing there can be no question that the parties herein have:

A. specified and agreed: 1. only a limited type of grievance can go to arbitration; 2. a Court, and only a Court, should determine what are arbitrable issues and direct arbitration of such issues;

B. strictly limited the scope of the authority granted to an arbitrator by express contractual language;

C. established time periods which must be met as conditions precedent to arbitration; and

D. specified the applicable law to be applied in construing the agreement.

Article XIV relating to "Strikes and Lockouts" is intimately related to this analysis (R. 79a). It cross-refers to Article XIII (Grievance Procedure) and Article XV (Arbitration). The Union has not surrendered its right to strike in this case under a general no-strike clause. There is a cooling off period which is intended to preclude strikes until reasonable discussion of the grievance can be had. Article XIV of the Agreement provides, in part, that neither the Union nor a Local will cause or sanction a strike "in connection with any matter subject to the grievance procedure, . . . unless and until all of the . . . steps of the grievance procedure . . . shall have been complied with by the Local and the Union, or *if* the matter is submitted to arbitration. . . ." (Italics ours.) This makes it clear that the Union has, subject only to Article XXVII,[5] an absolute right to strike unless the grievance is actually submitted to arbitration. Thus, whether a particular grievance is or is not arbitrable under the contract, the Union has the right to strike. With respect to grievances which are arbitrable under the contract the Union has the *option* to strike or arbitrate, as it wills. With respect to grievances which are nonarbitrable, the Union can strike or sue as it wills. In the case of arbitrable grievances, if the union decides to strike there is no restriction on its right to do so.

The Grievances.

Each of Respondent's grievances falls into one or more of the following categories: Grievances (1) where Respondent has failed to comply with contractual conditions prec-

[5] This section, in effect, embodies and expands on the provisions of Section 8(d) of the National Labor Relations Act, as amended, which precludes the reopening of matters settled by collective bargaining.

cedent to arbitration, (2) where the subject matter of the grievance has been expressly excluded from the competence of the arbitrator, (3) where the grievance involves a representation matter within the jurisdiction of the National Labor Relations Board, and (4) where the relief requested is a violation of law.

(1)

In National Docket Nos. 4910 and 4928 the grievances were not presented at Step One of the grievance procedure in a reasonable time as required by Article XIII (a)(1) of the contract (R. 11a). National Docket Nos. 3970 and 3971 involve grievances that were not referred to Step Three of the grievance procedure within three months as required by Article XIII (c) of the contract (R. 11a). National Docket Nos. 4910, 4928, 4665, 5039, 4922, 4454 and 4606-4611 are grievances in which the Respondent failed to request a panel from the American Arbitration Association within 10 days as required by Article XV (2) of the contract (R. 11a).

(2)

Six grievances request relief concerning which the contract expressly states [Article XV 3(b)]: "No arbitrator shall have the authority to establish or modify any wage, salary or piece rate, or job classification, or authority to decide the appropriate classification of any employee . . ." Thus National Docket Nos. 4665, 3830 and 5039 request modification of rates. National Docket Nos. 3830, 4922 and 4557 request modification of job classification and National Docket Nos. 4485 and 3830 request a determination of appropriate classification.

(3)

Three grievances involve representation disputes. Thus in National Docket Nos. 4606-4611, Respondent asserts its union members are entitled to work assigned to employees represented by another union, the International Association of Machinists (R. 71a-72a). In National Docket No. 4144, Respondent asserts its contract should apply to a group of professional employees excluded from the bargaining unit by the National Labor Relations Board certification because they did "assembly work alongside of other Assemblers who were within the bargaining unit. . . ." (R. 67a). In National Docket No. 4922, Respondent asserts certain employees have been improperly removed from the bargaining unit (R. 63a).

(4)

In National Docket No. 4557 the Respondent is seeking an award eradicating the continued accrual of an employee's seniority while he was working in a certified bargaining unit not represented by the Respondent Union. The contract provision relied upon (R. 76a) draws a distinction between employees who transfer to jobs outside any bargaining unit and those who transfer and "have been certified in a bargaining unit not covered by this Agreement." The former, so it is provided, accrue seniority while outside the unit. Those who are certified in a unit not represented by Respondent Union do not accrue seniority. The award sought is in direct conflict with *Menasco Mfg. Co.*, 123 NLRB 627 (1959), modified (*NLRB* v. *IAM*), 279 F. 2d 761 (9th Cir. 1960), which held the very objective of the same contractual provision a violation of law by discriminating against employees who joined other unions or refrained from joining any union.

Decisions of the Courts Below.

After discussing the effect of the Supreme Court decisions in the *Steelworkers* trilogy,[6] District Court Judge Palmieri addressed himself to the effect of the express provision of the contract that it is to be governed by New York law. He concluded that the Federal law is controlling and that the New York law is to be given no application, although the result of this conclusion obviously is to deprive the clause of meaning or effect.

Judge Kaufman, in the Circuit Court of Appeals opinion, does not discuss this matter.

Judge Palmieri next addressed himself to the question whether failure to comply with the procedural requirements of the arbitration agreement deprives the arbitrator of jurisdiction and whether this question is to be determined by the Court or the arbitrator. Judge Palmieri noted that there is a conflict between the Circuits on this question and that the question has not been settled by the Supreme Court. While the District Court opinion indicates considerable difficulty in reaching a conclusion on the subject, it suggested, apparently for the first time, a rule that the question is to be determined by the arbitrator when it presents matters within his special competence, and is to be determined by the Court as to questions not within the special competence of the arbitrator. Applying this test, the only procedural question which the Court found not to be within the special competence of the arbitrator was whether the failure of the union to request a panel within ten days after the written request for arbitration is a condition precedent to arbitra-

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[6] *United Steelworkers of America* v. *American Manufacturing Co.*, 363 U. S. 564 (1960); *United Steelworkers of America* v. *Warrior and Gulf Navigation Co.*, 363 U. S. 574 (1960); *United Steelworkers of America* v. *Enterprise Wheel and Car Corp.*, 363 U. S. 593 (1960).

tion. The opinion found the facts on this point in favor of Petitioner but decided the question in favor of the Respondent Union (pp. A-18-20, Appendix).

The Circuit Court held that "the question of compliance with conditions precedent was a matter solely for the arbitrator to decide" (p. A-40, Appendix). It affirmed the portion of the District Court's order which submitted procedural questions to arbitration but reversed those portions of the order holding the Union excused from making a timely request for a panel of arbitrators and ordered that this question be submitted to the arbitrator for decision (p. A-42, Appendix).

The District Court had considerable difficulty with the interpretation of Clause 3(b) of Article XV of the collective bargaining agreement. Judge Palmieri frankly stated (p. A-28, Appendix) that to construe the agreement as permitting arbitration of these grievances "may leave little of the exception." In an endeavor to apply what he conceived to be the philosophy of the *Steelworkers* cases, the District Court Judge reached the conclusion that what is involved "will not be to establish or modify any wage, salary, piece rate, or job classification, but to determine whether the wage, rate or job classification *prescribed by the contract* was applied in the particular cases before him." (p. A-28, Appendix). (Italics ours.)

This conclusion is reached in the very teeth of the provisions that ". . . *no arbitrator shall have* the authority to establish or *modify* any wage, salary or piece rate, or job classification, or *authority to decide the appropriate classification of any* employee . . ." (italics ours), and in light of the fact that the contract does not in any way "prescribe" any rate or job classification for any employee.

Judge Kaufman's Circuit Court opinion proceeds on the theory that the contractual limitations set out upon the

authority of the arbitrator do not deprive him of jurisdiction but merely circumscribe his award-making powers by restricting the remedies which he may fashion after deciding the merits of a grievance (pp. A-48, 49, Appendix). While we do not dispute that jurisdiction to decide a question implies jurisdiction to decide it either way, we contend for that very reason that if the only relief that a moving party seeks from an arbitrator is relief which the contract expressly forbids the arbitrator to give, no question remains of which the arbitrator can have jurisdiction.

Judge Palmieri acknowledged that the question raised by the Company's contention that certain of the grievances are not arbitrable, because they are within the exclusive jurisdiction of the National Labor Relations Board "is a difficult one . . ." (p. A-31, Appendix) and concluded:

> "While the decisions are by no means uniform, courts have compelled arbitration in a number of cases where the alleged breach of contract could clearly have also been a basis for an unfair labor charge before the Board." (citing numerous authorities)

The principal point raised in this connection by Petitioner is that of the cases cited by the District Court only one relates to a representation question, as do all the grievances involving this point herein.

The Circuit Court attempted to answer this point by indicating that it was not "persuaded that the possibility of some form of future conflict between the arbitrator's interpretation and a finding by the National Labor Relations Board in the area of representational disputes is so much more unsettling than in other areas to call for a different result." (p. A-56, Appendix). Nevertheless, the weight of reported authority indicates the strong reasons

for a different result in the case of representation disputes from that in unfair labor practices.

Judge Palmieri ruled in favor of petitioner where the Respondent Union presented a grievance, the sustaining of which would plainly constitute an unfair labor practice in violation of law. Judge Palmieri (p. A-34, Appendix) applied the well-known principle "*Ex pacto illicito non oritur actio*" and held

> "that it would be incongruous for the court to lend its assistance to a party seeking to enforce an unlawful claim by compelling the other party to arbitrate it." (p. A-34, Appendix)

The Court of Appeals reverses this portion of the District Court's order as premature. Not only does the opinion of the Court of Appeals indicate that the matter raises questions of contract interpretation but states that arbitration may have "therapeutic values" (p. A-59, Appendix). Moreover, that the arbitrator's award will conflict with the National Labor Relations Board's position is stated to be wholly conjectural. This in spite of the fact that the Circuit Court's position is predicated on the assumption that the relief requested is illegal.

A fundamental defect in the opinions of both Courts is that they completely overlook the fact that the parties could legally have refused to make *any* provision for arbitration and could have refused to impose *any* restriction on the Union's right to strike. They did not do this; but they did reach an agreement which sharply limited the scope of the arbitration provisions whilst preserving in goodly measure the right of the union to strike. The parties had agreed on *alternative* methods for the settlement even of those grievances which fall within the carefully restricted area of arbitrability. The Union here has *not*, as in *United*

Steelworkers of America v. *Warrior and Gulf Navigation Co.* [363 U. S. 574 (1960), *supra*, p. 11], surrendered the right to strike. Rather, it has acquired the additional right to decide for itself in every case whether it wishes to strike or, in arbitrable cases, whether it prefers arbitration. The opinions have to a large extent nullified the agreed limitations on arbitration without, of course, in any way expanding the scope of the Union's limited pledge restricting strikes. In effect, they give the Union not only the right to decide *when* arbitration would be invoked but whether it was *invocable* as well. They have thereby upset the internal balance of promises out of which the agreement between the parties was reached. Thus these decisions did not enforce the agreement between the parties—they forcibly replaced it with another the parties never made.

Whatever may be said to favor the view that the scope of an arbitration clause should be broadened by construction or presumption to match a general no strike clause (express or implied) such contention certainly is without the faintest support or justification where the broad no strike clause does not exist. The parties in this case had balanced the *quid* and the *quo* by matching clearly stated limits on the scope of the arbitration clause with equally clearly stated limits on the scope of the clause against strikes. The destruction of this balance, which the parties had every right to achieve, as accomplished by the opinions below, cannot justly be accomplished in the name of public policy or of the law.

Reasons for Granting the Writ.

This petition for a writ of certiorari should be granted because:

1. (a) i. On the question whether compliance with contractual conditions precedent to arbitration are to be determined by the Court or the arbitrator, the decision of the Court of Appeals is in conflict with decisions of the United States Courts of Appeals for the First and Seventh Circuits, and with District Court decisions in the Eighth, Ninth and Tenth Circuits.

ii. The Court of Appeals decision referring to the arbitrator questions of compliance with contractual conditions precedent to arbitration is in conflict with decisions of this Court and has impaired the obligation of contract.

(b) On the question whether a Court should direct arbitration of a matter in the face of a contract providing that no arbitrator shall have authorization to decide such matter, the decision of the Court of Appeals has misinterpreted the decisions of this Court and is in conflict with a decision of the New York State Court of Appeals.

2. On the question whether the court may direct arbitration of representation disputes including the scope of a bargaining unit under a National Labor Relations Board certification, the decision of the Court of Appeals is in conflict with decisions of the United States Court of Appeals for the First Circuit, the New York State Court of Appeals and with District Court decisions in the Third, Seventh, Ninth and Tenth Circuits.

3. The decision of the Court of Appeals raises other important questions of Federal Law.

Argument in Support of Reasons.

1(a)i.

On the question whether compliance with contractual conditions precedent to arbitration are to be determined by the Court or the arbitrator, the decision of the Court of Appeals is in conflict with decisions of the United States Courts of Appeals for the First and Seventh Circuits, and with District Court decisions in the Eighth, Ninth and Tenth Circuits.

As noted by the District Court Judge Palmieri (p. A-12, Appendix), the First and Seventh Circuits have held that questions of compliance with the procedural requirements of the grievance and arbitration provisions are to be decided by the Court [*Boston Mutual Life Ins. Co.* v. *Insurance Agents Int'l Union*, 258 F. 2d 516 (1st Cir. 1958); *Brass & Copper Workers Union* v. *American Brass Co.*, 272 F. 2d 849 (7th Cir. 1959), cert. denied 363 U. S. 845, (1960), petition for rehearing denied, 364 U. S. 856 (1960)], while the Third Circuit held such questions are for the arbitrator [*Radio Corp. of America* v. *Association of Professional Eng's Personnel*, 291 F. 2d 105 (3rd Cir. 1961), cert. denied, 368 U. S. 898 (1961); *Association of Westinghouse Salaried Employees* v. *Westinghouse Electric Corp.*, 283 F. 2d 93 (3rd Cir. 1960)]. The Sixth Circuit has also recently held such questions are for the arbitrator, *Jefferson City Cabinet Company* v. *Electrical Workers*, 313 F.2d 231 (6th Cir. 1963); cert. granted (Nos. 1002, 1004, Oct. Term 1962, filed April 9, 1963).

Reflecting this split of authority the District Courts are similarly divided.[7]

The state courts are also divided.[8]

The Circuit Court relied on *Livingston* v. *John Wiley & Sons, Inc.*, F. 2d 52 LRRM 2223 (1963) (2d Cir. Jan. 11, 1963) for its decision on this branch of the case. *Wiley* is presently before this Court on a petition for certiorari. (No. 934 Oct. Term 1962, filed March 15, 1963). The frequency of litigation on this question of procedural arbitrability and the split in authority makes it most important for this Court to rule on such issue.

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[7] Procedural arbitrability is for the Court: *Truck Drivers* v. *Grosshans & Peterson Inc.*, 209 F. Supp. 164 (D. Kan. 1962); *United Brick & Clay Workers* v. *Gladding, McBean & Co.*, 192 F. Supp. 64 (S. D. Calif. 1961); *General Tire & Rubber Co.* v. *Local 512, United Rubber Workers of America, AFL-CIO*, 191 F. Supp. 911 (D. R. I. 1961), affirmed 294 F. 2d 957 (1st Cir. 1961); *International Union of Operating Engineers* v. *Monsanto Chemical Co.*, 164 F. Supp. 406 (W. D. Ark. 1958); *Grocery & Food Products Warehouse Employees Local 738* v. *Thomson & Taylor Spice Co.*, F. Supp. , 46 CCH Lab. Cas. ¶18,103 (N. D. Ill. 1963).

Procedural arbitrability is for the arbitrators: *Philadelphia Dress Joint Board* v. *Sidele Fashions, Inc.*, 187 F. Supp. 97 (E. D. Pa. 1960); *United Cement Workers International Union, AFL-CIO* v. *Allentown-Portland Cement Co.*, 163 F. Supp. 816 (E. D. Pa. 1958).

[8] Procedural arbitrability is for the court: *Vulcan Cincinnati, Inc.* v. *Steelworkers*, 173 NE 2d 709 (Ohio App. 1960); *Matter of Board of Education [Heckler Electric Co.]* 7 N. Y. 2d 476, 199 N. Y. S. 2d 649 (1960); *International Union of Electrical Workers* v. *Remington Rand*, 19 Misc. 2d 829, 191 N. Y. S. 2d 880 (Sp. Term N. Y. Co. 1959).

Procedural arbitrability is for the arbitrator: *Southwestern New Hampshire Transportation Company* v. *Durham*, 102 N. H. 169, 152 A. 2d 596 (1959).

ii.

The Court of Appeals decision referring to the arbitrator questions of compliance with contractual conditions precedent to arbitration is in conflict with decisions of this Court and has impaired the obligation of contract.

In *Atkinson v. Sinclair Refining Company*, 370 U. S. 238 (1962) at 241, this Court stated unequivocally that "Under our decisions, whether or not the company was bound to arbitrate, as well as what issues it must arbitrate, is a matter to be determined by the Court on the basis of the contract entered into by the parties." The question before the Court is—Has the reluctant party breached its agreement to arbitrate? In order to answer this question it is obviously necessary to determine whether the party seeking arbitration has complied with contractual conditions precedent to arbitration. Without such determination it obviously cannot be said that the other party has breached its contract to arbitrate.

Moreover, in the case at bar, the agreement provides in part:

> "XV 2(b). It is further expressly understood and agreed that the American Arbitration Association shall have no authority to process a request for arbitration or appoint an arbitrator if either party shall advise the Association that such request arises under Section 1(a) of this Article, but that the grievance desired to be arbitrated does not, in its opinion, raise an arbitrable issue. In such event, the Association shall have authority to process the request for arbitration and appoint an arbitrator in accordance with its rules only after a final judgment of a Court has determined that the grievance upon which arbitration has been requested raises

arbitratable issues and has directed arbitration of such issues"? (R. 80a-81a).

Thus the agreement of the parties expressly contemplates that preliminary questions should be decided by a court, not the arbitrator. By sending these preliminary questions to the arbitrator, the Circuit Court has frustrated the express agreement of the parties.

(b).

On the question whether a court should direct arbitration of a matter in the face of a contract providing that no arbitrator shall have authorization to decide such matter, the decision of the Court of Appeals has misinterpreted the decisions of this Court and is in conflict with a decision of the New York State Court of Appeals.

As we have seen, if either party questions arbitrability, the contract herein expressly provides that arbitration can only proceed after a final judgment of a Court has determined arbitrability. (Article XV, Section 2(b), R. pp. 80a-81a). Also it provides "no arbitrator shall have the authority to establish or modify any wage, salary or piece rate, or job classification or authority to decide the appropriate classification of any employee." (Article XV, Section 3(b), R. p. 81a). The subject grievances involve changes in rates, job classifications and determinations of appropriate classification. *All these are matters expressly excluded from the authority or jurisdiction of an arbitrator.* The contractual provisions make it evident that whether there are arbitrable issues is to be determined before, *not after*, arbitration has been had. If, by the contract, arbitration cannot result in an effectual award, then, it is evident

that under the agreement, arbitration must be denied. The contractual limits on the power of the arbitrator are an integral part of the boundary of the promise to arbitrate.

The Circuit Court concludes that the contractual provisions merely limit the award-making power of the arbitrator, but not his jurisdiction to hear the grievance. It found the Arbitration Article "ambiguous" (p. A-47, Appendix). However, it ignored petitioner's contention that under such circumstances extrinsic evidence should be taken to interpret the agreement (*Pacific Northwest Bell Telephone Company* v. *Communication Workers of America*, F. 2d CCH 46 L. C. ¶17, 889 (9th Cir. 1962). Neither *United Steelworkers of America* v. *American Manufacturing Co.*, 363 U. S. 564 (1960), *United Steelworkers of America* v. *Warrior and Gulf Navigation Co.*, 363 U. S. 574 (1960) nor *United Steelworkers of America* v. *Enterprise Wheel and Car Corp.*, 363 U. S. 593 (1960) hold it improper to consider evidence of bargaining history as bearing on the meaning of an ambiguous arbitration clause.

Basically the Petitioner's position is that the Court of Appeals has decided a federal question in a way in conflict with the applicable decisions of this Court. *Atkinson* v. *Sinclair Refining Company*, *supra*, p. 18, *Drake Bakeries, Incorporated* v. *Local 50*, 370 U. S. 254 (1962) and *Chauffeurs, Teamsters and Helpers Local Union No. 795, etc.* v. *Yellow Transit Freight Lines, Inc., et al.*, 370 U. S. 711 (1962) conclusively demonstrate the need for carefully preserving the contract. The agreement in the case at bar, like the contract in *Sinclair*, shows that the parties did not intend to submit all their disputes to arbitration, and the clause denying the arbitrator authority to establish or modify any wage rate or job classification or decide whether an employee has been appropriately classified by the Com-

pany, is at least as specific as the clause relied upon by this Court in *Sinclair*.

Moreover, the New York Court of Appeals in *Carey* v. *Westinghouse Electric Corporation*, 11 N. Y. 2d 452 (1962), rendered a decision denying arbitration where the contract clause closely paralleled the provision under consideration. The New York Court of Appeals stated (11 N. Y. 2d at 456):

> "The parties here having agreed that no arbitrator should have authorization to 'Establish or modify' time values, it is clear that such problems had, by agreement, been taken out of the arbitration process outlined in the contract. To submit such a grievance to arbitration now would be an idle gesture, as no valid award could be made. Nowhere in the collective bargaining agreement is there a statement which could be construed to mean that there has been an agreement for 'therapeutic' arbitration, incapable of enforcement."

Certiorari has been denied on this question in *Carey* v. *Westinghouse Electric Company* (No. 485, October Term 1962, filed October 4, 1962). Since state courts have concurrent jurisdiction to enforce collective bargaining agreements within the purview of §301(a) of the Labor Management Relations Act (*Charles Dowd Box Co.* v. *Courtney*, 368 U. S. 502 (1962), but must apply federal law in such cases (*Local 174, Teamsters* v. *Lucas Flour Co.*, 369 U. S. 95 (1962)) it becomes imperative to resolve the conflicting decisions that would result depending on whether a case is processed in New York through the State or Federal Courts.[9]

[9] The Third Circuit cases of *IUE* v. *Westinghouse Electric Corp.*, 268 F. 2d 352 (1959) and *Radio Corp. of America* v. *Ass'n of Professional Eng'g's Personnel*, 291 F. 2d 105, cert. denied, 368 U. S. 898 (1961) referred to in the Circuit Court's opinion

2.

On the question whether the Court may direct arbitration of representation disputes including the scope of a bargaining unit under a National Labor Relations Board certification, the decision of the Court of Appeals is in conflict with decisions of the United States Court of Appeals for the First Circuit, the New York State Court of Appeals and with District Court decisions in the Third, Seventh, Ninth and Tenth Circuits.

The determination of the Court of Appeals in this case directing arbitration of representation disputes including the question of the scope of a bargaining unit under a National Labor Relations Board certification relied almost entirely on decisions involving unfair labor practice situations and not questions of representation.[10]

Section 9 of the National Labor Relations Act, 1947, as amended (29 U. S. C. 159), vests in the National Labor Relations Board exclusive jurisdiction to decide what, in any given case, is an "appropriate unit" for bargaining. It also determines inclusions in and exclusions from the bargaining unit. The "informed discretion" of the National

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(pp. A-48, 50 Appendix) are distinguishable. Similar contract provisions resulted in exclusions from the arbitration process in *Underwood Corporation* v. *Local 267, International Union of E. R. & M. Workers*, 188 F. Supp. 205 (D. Conn., 1960) and *Sunnyvale Westinghouse Salaried Employees Association* v. *Westinghouse Electric Corporation*, 175 F. Supp. 685 (W. D. Pa., 1959), aff'd 276 F. 2d 927 (3rd Cir. 1960).

[10] The sole exception is *Freight Drivers, Local 557, IBT* v. *Quinn Freight Lines*, 195 F. Supp. 180 (D. Mass. 1961), the rationale of which has since been repudiated by the Court of Appeals in which the case arose. *Local 1505, Int'l Bhd. of Elec. Workers* v. *Local 1836, Int'l Ass'n of Machinists*, 304 F. 2d 365 (1st Cir. 1962), cert. granted, 31 U. S. L. Week 3171, No. 439 (U. S. Nov. 19, 1962).

Labor Relations Board cannot be interfered with by courts (*N. L. R. B.* v. *Weyerhaeuser Co.*, 276 F. 2d 865 (7th Cir. 1960), cert. den. 364 U. S. 879). Thus these grievances invade the province of exclusive National Labor Relations Board jurisdiction and should be denied. (*Local 6, Chemical Workers* v. *Olin Mathieson Corporation*, 202 F. Supp. 363 (S. D. Ill. 1962); *Local 1357, Retail Clerks* v. *Food Fair Stores*, 202 F. Supp. 322 (D. C. Pa. 1961); *International Union* v. *Metal Polishers Union*, 180 F. Supp. 289 (S. D. Cal. 1960); *In re American Buslines, Inc.*, 151 F. Supp. 877 (D. Neb. 1957); see also, *Carey et al.* v. *Westinghouse Electric Corp.*, *supra*, p. 22.)

Most significant is the fact, as indicated in the Court of Appeals opinion, that the language of the only Circuit Court case which approached this issue militates against the instant Court of Appeals holding (*Local 1505, Int'l Bhd. of Elec. Workers* v. *Local 1836, Int'l Ass'n of Machinists*, 304 F. 2d 365 (1st Cir. 1962), cert. granted, 31 U. S. L. Week 3171, No. 419 (U. S. Nov. 19, 1962)). While counsel in that case have entered into a settlement agreement, requesting that the Supreme Court remand the case and order that the complaint be dismissed, which this Court has honored, the opinion stands as an expression of the law in this area in the First Circuit.

The New York Court of Appeals in *Carey* v. *Westinghouse Electric Corporation*, *supra*, p. 22, rendered its decision denying arbitrability on facts on all fours with this issue in the case at bar. As we have previously indicated *Carey* v. *Westinghouse Electric Company* is now before this Court which has granted certiorari in that case on this issue (No. 485, October Term 1962, filed October 4, 1962). Again the different result that may prevail if a case on this frequently litigated subject is processed through the State or Federal Courts in New York makes a determination on this question by this Court imperative.

3.

The decision of the Court of Appeals raises other important questions of Federal Law.

1. Petitioner urges the granting of the writ of certiorari on the question whether a court may direct arbitration of a grievance where the relief requested is a violation of law.

The opinion of the Court of Appeals goes so far as to assume as Judge Palmieri did that the relief requested by Respondent from the arbitrator violates the National Labor Relations Act (p. A-59, Appendix) and then by-passes the question on the basis that it is conjectural that the arbitrator's award will run counter to the law. This reasoning takes no account of two pertinent elements calling for the opposite result to that reached below: 1) arbitrators under a contract are not bound to follow the law and 2) the Court should not aid a party seeking an illegal result.

The element of public policy inherent in this phase of the case, we submit, calls for review by this Court.

2. Whether the Court may in a proceeding under Section 301(a) of the Labor-Management Relations Act to compel arbitration deny effect to a contract clause which provides what law should govern, should, we submit, be authoritatively settled by this Court.

The Court of Appeals opinion ignored this question. The District Court's opinion stated little more than that *Lucas Flour, supra*, p. 22, requires the states to apply Federal law in Section 301 suits. Thus Petitioner's Article XV, subd. 4, providing:

> "This Agreement and its interpretation and application shall in all respects be governed by the law of the State of New York."

was rendered a nullity (p. A-8, Appendix).

But the validity of contract provisions incorporating a special rule or rules of contract construction is, of course, hornbook law [see Goodrich, *Conflict of Laws* (3rd Ed., p. 340); 2 Beale, *Conflict of Laws*, §346.2; 62 *Harv. Law Rev.* 647, 649 (1949)].

The case of *Local 174 Teamsters* v. *Lucas Flour Company, supra*, p. 22, holds that state courts must apply federal law in exercising their concurrent jurisdiction (with federal courts) over suits involving violations of collective bargaining agreements. We do not question this as a general proposition of law where the parties have not contracted as to the law which is to govern the interpretation of the contract. But *Lucas* did not involve an agreement containing a provision expressly specifying what law should apply as in the instant situation. Where, as here, the parties agree on the governing law, *Lucas* should not be applied to impair the obligations of the contract. *Lucas* did not sweep New York law out of existence; it continues as a vital and governing force wherever, as here, it may properly be invoked by the parties.

The doctrine of federal preemption cannot and was not intended to preclude *contracting* parties from establishing their own *rules of contract construction.*

Section 301, under the *Lincoln Mills* decision [353 U.S. 448 (1957)], now constitutes the prime fountainhead for enforcement of collective bargaining agreements. And that decision commands the judiciary to construct a corpus of rules of construction of such agreements. Contracting parties are not free to eliminate the jurisdictional function of Section 301, but they *are* free to do what the parties herein have done—adopt their own rules for the construction of their own contract. Once adopted, such rules supersede even those being created by the federal courts.

Conclusion.

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be granted.

Dated: April 29, 1963.

Respectfully submitted,

David L. Benetar,
Counsel for Petitioner,
420 Lexington Avenue,
New York 17, N. Y.

Thomas F. Hilbert, Jr.
H. H. Nordlinger,
Robert C. Isaacs,
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Of Counsel.

APPENDIX.

Opinion and Order of the District Court for the Southern District of New York.

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK.

IN THE MATTER *of* JAMES B. CAREY, as President of INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO, Petitioner, *against* GENERAL ELECTRIC COMPANY, Respondent.	Index No. 61 Civ. 3636

The petitioner having moved this Court by notice of motion dated October 24, 1961, for an order directing that arbitration proceed in the manner provided for in the arbitration agreement between the parties of the unsettled grievances known as National Docket Nos. 4485, 4910, 4928, 3970, 3971, 4665, 3830, 5029, 4922, 4114, 4454, 4557, 4606, 4607, 4608, 4609, 4610 and 4611; and that said order shall further provide that within ten days of the service of a copy of said order with notice of entry thereof, the parties shall proceed with the selection of an arbitrator and with arbitration in accordance with the Voluntary Arbitration Rules of the American Arbitration Association, except insofar as said Rules have been modified by the collective bargaining agreement; and said motion having duly come on to be heard on the 12th day of December, 1961, and Lieberman, Katz & Aronson, attorneys for the petitioner, having

appeared in support of said motion, and Nordlinger, Riegelman, Benetar & Charney, attorneys for the respondent, having appeared in opposition thereto:

Now, on reading and filing the aforesaid notice of motion dated October 24, 1961, the petition of James B. Carey, verified the 15th day of September 1961, the affidavits of John J. Callahan, verified the 6th day of December, 1961 and the 14th day of December, 1961, together with proof of service thereof, all submitted in support of said motion, and the answer by respondent, verified by Virgil B. Day on December 4, 1961, the affidavit of David L. Benetar, verified December 28, 1961, the affidavit of Philip D. Moore, verified December 27, 1961, and the affidavit of Raymond E. Zook, verified February 15, 1962, all submitted in opposition thereto; and the petition of the respondent to remove the action from the Supreme Court of the State of New York to the United States District Court for the Southern District of New York, verified by Virgil B. Day on October 13, 1961; and upon the decision of the Court filed herein;

It Is Now, on motion of Lieberman, Katz & Aronson, attorneys for the petitioner,

Ordered that the motion, insofar as it relates to the unsettled grievances known as National Docket Nos. 4485, 4910, 4928, 3970, 3971, 4665, 3830, 5039, 4922, 4114, 4454, 4606, 4607, 4608, 4609, 4610 and 4611, be, and the same hereby is, in all respects granted; and it is further

Ordered that the motion, insofar as it relates to the unsettled grievance known as National Docket No. 4557, be, and the same hereby is denied; and it is further

Ordered that arbitration be had of the issues involved in the unsettled grievances known as National Docket Nos. 4485, 4910, 4928, 3970, 3971, 4665, 3830, 5039, 4922, 4114, 4454, 4606, 4607, 4608, 4609, 4610 and 4611 as requested by the petitioner, which have arisen under the collective bar-

gaining agreement, and shall proceed between International Union of Electrical, Radio and Machine Workers, AFL-CIO, petitioner Union, and General Electric Company, respondent, in the way and manner set forth and provided for in the collective bargaining agreement referred to in the aforesaid petition, within ten (10) days from the date of service of a copy of this order with notice of entry thereon.

Dated: New York, New York,
April 25, 1962.

Enter,

E. P.,
D. J.

Opinion of Edmund L. Palmieri.

PALMIERI, J.

This is a motion by the President of the International Union of Electrical, Radio and Machine Workers, AFL-CIO (hereinafter Union), an unincorporated labor organization, to compel arbitration of twelve[1] grievances between members of various locals of the parent union and the General Electric Company (hereinafter Company). The action was originally commenced in the New York State Supreme Court by service of a verified petition and notice of motion. N. Y. Civil Practice Act §§1448-1469. It was removed to this court by respondent. 28 U. S. C. §§1441, 1446. The Company is engaged in an industry affecting commerce and federal jurisdiction is based on Section 301 of the Labor Management Relations Act of 1947, 29 U. S. C. §185.

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[1] The petition contains fourteen grievances, but two of the grievances, National Docket No. 4142, Local 201, West Lynn, Massachusetts, and National Docket No. 3996, Local 747, Jonesboro, Arkansas, were removed from this proceeding.

The agreement between the Union and the Company provides for arbitration of any grievance involving the interpretation or application of a provision of the agreement which remains unsettled after having been fully processed pursuant to the grievance procedure.

The petition alleges that all the grievances involve interpretation or application of the agreement between the parent Union and the Company, and that some involve interpretation or application of local supplements to which the parent agreement is subject. Respondent objects to arbitration of these grievances on a number of grounds disposition of which requires resolution of the following questions: whether the action is to be governed by New York or Federal law; whether arbitration of certain grievances is barred by failure to comply with procedural requirements of the grievance and arbitration provisions; whether certain of the grievances do involve interpretation or application of the agreement; whether certain of the grievances are excluded from arbitration by other provisions of the agreement; and whether disputes that involve matters actually or potentially within the scope of the jurisdiction of the National Labor Relations Board may be determined by arbitration.[3]

The labor philosophy that forms the framework for the resolution of some of these questions was given expression by the Supreme Court in *Textile Workers Union v. Lincoln Mills of Alabama*, 353 U. S. 448 (1957), and in its more

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[2] Certain of the grievances arose under the 1955 agreement and other arose under the 1960 agreement but the grievance and arbitration provisions, insofar as relevant, are identical in both agreements.

[3] Respondent also denies certain allegations, thus raising defenses going to the merits of the disputes. It is well established legal doctrine that the merits of a claim may not be considered by the court where the parties have agreed to submit the dispute to arbitration. See the *Steelworker* cases, discussed below, and Hays, *infra*, at pp. 920-21.

recent decision in the *Steelworker* cases. *United Steelworkers* v. *American Manufacturing Co.*, 363 U. S. 564 (1960); *United Steelworkers* v. *Warrior & Gulf Navigation Co.*, 363 U. S. 575 (1960); *United Steelworkers* v. *Enterprise Wheel & Car Corp.*, 363 U. S. 593 (1960).

Although section 301 of the Taft-Hartley Act does not set forth the law to be applied in actions for violation of collective bargaining agreements, the Supreme Court in *Lincoln Mills* held that suits under section 301 are to be governed by federal law and that that law is to be fashioned by the federal courts from the national labor policy.[4] The federal law to be applied in suits to compel arbitration was formulated by the Supreme Court in broad and emphatic terms in its landmark decisions in the *Steelworker* cases.[5] The result of these cases, as stated by one labor law authority, now a judge of this Circuit, was to "uphold the a[illegible]trator in the exercise of the broadest jurisdiction in the absence of special contractual limitations on that jurisdic-

[4] In holding that section 301 provides for the application of federal substantive law, the Court avoided the question whether Congress can confer jurisdiction on Article III Courts over actions that are not based on federal law and not subject to federal jurisdiction on diversity grounds. See Hart and Wechsler, The Federal Courts and the Federal System, pp. 744-747. Justice Burton wrote a concurring opinion, in which Justice Harlan joined, specifically stating that they did "not subscribe to the conclusion of the Court that the substantive law to be applied in a suit under § 301 is federal law." They held, however, that since some federal rights may be involved in suits under section 301, "the constitutionality of § 301 can be upheld as a Congressional grant to Federal District Courts of what has been called 'protective jurisdiction'." 353 U. S. 460. Justice Frankfurter dissented. Since he did not construe § 301 as providing for the application of federal substantive law, pp. 462-69, and did not subscribe to the theory of protective jurisdiction, pp. 473-75, or any other theory that would justify District Court jurisdiction in the absence of governing federal law, he concluded that this section was unconstitutional.

[5] *United Steelworkers* v. *Enterprise Wheel & Car Corp.*, *supra*, was an action to enforce an arbitration award, not an action to

tion." Hays, The Supreme Court and Labor Law October Term, 1959, 60 Colum. L. Rev. 901, 920 (1960).

In these cases the Court developed at some length its view that collective bargaining agreements are different from contracts generally, that arbitration of labor disputes serves a different function from arbitration of commercial disputes, and that in view of these considerations the judicial attitude in interpreting arbitration provisions in collective bargaining agreements should be one favoring arbitration where the contract permits of such an interpretation. Thus, the Court stated:

> A collective bargaining agreement is an effort to create a system of industrial self-government . . . [T]he grievance machinery under a collective bargaining agreement is at the very heart of the system of industrial self-government. Arbitration is the means of solving the unforeseeable by molding a system of private law for all the problems which may arise and to provide for their solution in a way which will generally accord with the variant needs and desires of the parties. The processing of disputes through the grievance machinery is actually a vehicle by which meaning and content are given to the collective bargaining agreement.

In *Warrior, supra*, the Court quoted from Cox, Reflections Upon Labor Arbitration, 72 Harv. L. Rev. 1482, 1498-99 (1959), as follows:

> . . . [I]t is not unqualifiedly true that a collective-bargaining agreement is simply a document by which the union and employees have imposed upon management limited, express restrictions of its otherwise absolute right to manage the enterprise, so that an

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compel arbitration. In this case, too, however, the decision and language of the Court indicate a labor philosophy strongly favoring the resolution of labor disputes by arbitration.

employee's claim must fail unless he can point to a specific contract provision upon which the claim is founded. There are too many people, too many problems, too many unforeseeable contingencies to make the words of the contract the exclusive source of rights and duties. One cannot reduce all the rules governing a community like an industrial plant to fifteen or even fifty pages. Within the sphere of collective bargaining, the institutional characteristics and the governmental nature of the collective-bargaining process demand a common law of the shop which implements and furnishes the context of the agreement. We must assume that intelligent negotiators acknowledged so plain a need unless they stated a contrary rule in plain words. 363 U. S. at 579-580.

THE APPLICABLE LAW

Respondent contends, however, that the philosophy reflected in the *Steelworker* cases and the rules developed by the federal courts in construing arbitration agreements do not apply in the instant case because the collective bargaining agreement between it and petitioner specifically provides that it is to be governed by New York law. The recent decision of the Supreme Court in *Local 174, Teamsters v. Lucas Flour Co.*, 369 U. S. 95 (1962), makes it unnecessary to consider this contention at any length. In the *Lucas* case the Court held that state courts adjudicating disputes within the purview of section 301 must apply federal law. The Court said:

> The dimensions of §301 require the conclusion that substantive principles of federal law must be paramount in the area covered by the statute. Comprehensiveness is inherent in the process by which the law is to be formulated under the mandate of

Lincoln Mills, requiring issues raised in suits of a kind covered by §301 to be decided according to the precepts of federal labor policy. 369 U. S. 103.

Thus New York courts are now bound by federal law in actions within the purview of section 301. Had the instant case continued in the New York courts, "incompatible doctrines of local law [would have had to] give way to principles of federal labor law." *Id.* at p. 102. Clearly, it must also be governed by federal law here.[6]

PROCEDURAL ARBITRABILITY

The Collective Bargaining Agreement between the Union and the Company provides for a three step grievance procedure culminating in arbitration of any unsettled grievance which involves "the interpretation or application of a provision" of the agreement. The procedure, in pertinent part, is as follows:[7]

ARTICLE XIII

GRIEVANCE PROCEDURE

* * * * * *

Grievances other than those of a general nature may be processed only by recourse to the following successive steps:

(a) *Step One*

(1) Within a reasonable time after the occurrence or knowledge of the situation, condition or action of

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[6] While this renders the clause providing for application of New York law meaningless, the only way to preserve that clause would be to interpret it as incorporating into the contract the New York law as it existed at the date the contract was entered into. But such a construction would be contrary both to sound principles of contract construction and to the national labor policy.

[7] The language quoted is identical in the 1955 and 1960 agreements.

Management giving rise to the grievance, the employee affected thereby or his Steward may present the grievance to the employee's Foreman or other immediate supervisor.

* * * * * *

(c) *Step Three*

Any grievance, having been processed through Step Two without satisfactory settlement, may be referred to the National Officers of the Union for submission to an Executive Officer of the Company or his designated representative, who shall arrange meetings for the purpose of discussing such grievances.

Such grievances shall be submitted to the Company not less than two weeks prior to the date of any discussion and not more than three months after the completion of discussions and the final decision of local Management at Step Two.

ARTICLE XV

Arbitration

1. Any grievance [subject to arbitration] shall be submitted to arbitration upon written request of either the Union or the Company, provided such request is made within 30 days after the final decision of the Company has been given to the Union pursuant to Article XIII, Section 2(e). * * *

2. (a) Within 10 days following a written request for arbitration of a grievance, the Company or the Union may request the American Arbitration Association to submit a Panel of names from which an arbitrator may be chosen. In the selection of an arbitrator and the conduct of any arbitration, the Voluntary Labor Arbitration Rules of the

American Arbitration Association shall control [with exceptions not mentioned here].

(b) It is further expressly understood and agreed that the American Arbitration Association shall have no authority to process a request for arbitration or appoint an arbitrator if either party shall advise the Association that . . . the grievance desired to be arbitrated does not, in its opinion, raise an arbitrable issue. In such event, the Association shall have authority to process the request for arbitration and appoint an arbitrator in accordance with its rules only after a final judgment of a Court has determined that the grievance upon which arbitration has been requested raises arbitrable issues and has directed arbitration of such issues.

The Company objects to arbitration of two of the grievances[8] on the ground that they were not presented within a reasonable time, as required by Article XIII(a)(1); to two of the grievances[9] on the ground that they were not referred to Step Three within three months, as required by Article XIII(c); and to seven[10] of the grievances on the ground that the Union failed to request a Panel within 10 days as required by Article XV(2)(a).

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[8] National Docket No. 4910 and No. 4928 (Local No. 320, Syracuse, N. Y.).

[9] National Docket No. 3970 and No. 3971 (Local No. 255, Pittsfield, Mass.).

[10] Failure to request the American Arbitration Association to submit a Panel within 10 days was raised as a defense to National Docket Nos. 4910, 4928, 4665, 5039, 4922, 4454, 4606-4611. The following chart indicates the date on which the grievance procedure was completed, the date on which the Union submitted a request for arbitration to the American Arbitration Association, the date on which the Union requested a Panel, the date on which the Company notified the Association that it did not consider the grievance arbitrable, and the date on which the Association notified the Union and the Company that it had stopped processing the grievance.

Grievance	Date Grievance Procedure Completed	Date Union Submitted Request for Arbitration	Date Union Requested American Arbitration Association to Submit a Panel	Date Company Notified American Arbitration Association That It Did Not Consider the Grievance Arbitrable	Date American Arbitration Association Notified Union That It Had Stopped Processing the Grievance
National Docket No. 4910					
Local #320 Syracuse, NY.....	June 6, 1960	June 9, 1960	December 16, 1960	December 21, 1960	January 10, 1961
4928					
Local #320 Syracuse, NY.....	June 6, 1960	June 9, 1960	July 12, 1960	July 18, 1960	July 20, 1960
4665					
Local #320 Syracuse, NY.....	February 29, 1960	March 9, 1960	May 9, 1960	June 14, 1960	August 16, 1960
5039					
Local #119 Philadelphia, Pa.....	June 30, 1960	July 5, 1960	July 28, 1960	August 12, 1960	August 16, 1960
4922					
Local #320 Syracuse, NY.....	June 6, 1960	June 23, 1960	July 12, 1960	July 15, 1960	July 19, 1960
4454					
Local #201 West Lynn, Mass.....	November 25, 1959	December 11, 1959	January 6, 1960	January 18, 1960	January 20, 1960
4606-4611					
Local #1081 DeKalb, Ill.....	February 25, 1960	March 9, 1960	June 15, 1960	June 27, 1960	June 29, 1960

These dates are taken from the petition and answer.

The initial question posed is whether objections to arbitration on the ground that the party seeking to compel it has failed to comply with the procedural requirements of the grievance and arbitration provisions is to be decided by the court or by the arbitrator. Thus far the Supreme Court has not ruled on this question. The Circuit Courts are not in agreement: The First and Seventh Circuits have held that the question was for the Court. *Boston Mutual Life Ins. Co.* v. *Insurance Agents' Int'l Union*, 258 F. 2d 516 (1st Cir. 1958); *Brass Workers Union* v. *American Brass Co.*, 272 F. 2d 849 (7th Cir. 1959), *cert. denied*, 363 U. S. 845 (1960), the Seventh Circuit relying on the previous decision of the First Circuit in *Boston Mutual*. The Third Circuit has held it was for the arbitrator. *Radio Corp. of America* v. *Association of Professional Eng'r Personnel*, 291 F. 2d 105 (3rd Cir. 1961); *cert. denied*, 368 U. S. 898; *Association of Westinghouse Salaried Employees* v. *Westinghouse Electric Corp.*, 283 F. 2d 93 (3rd Cir. 1960). The Fifth Circuit has ruled on questions of procedural noncompliance. *International Ass'n of Machinists* v. *Hayes Corp.*, 296 F. 2d 238 (5th Cir. 1961); *Southwestern Elec. Power Co.* v. *Local 738, International Bhd. Elec. Workers*, 293 F. 2d 929 (5th Cir. 1961), without discussing, however, whether such questions should be determined by the court or arbitrator. Both *Boston Mutual* and *Brass Workers* were decided before the Supreme Court decision in the *Steelworker* cases, and, of the Circuit Court cases in which the objection was ruled upon by the Court, the *Brass Workers* case, *supra*, was the only one in which the Court denied arbitration on the ground that the Union failed to comply with a procedural condition of the arbitration provision. The District Courts, too, have in some instances decided questions of procedural compliance, and in others held the question to be for the arbitrator. Compare *United Brick Workers* v. *Gladding McBean & Co.*, 192 F. Supp.

64 (S. D. Cal. 1961) and *General Tire & Rubber Co.* v. *Local 512, United Rubber Workers*, 191 F. Supp. 911 (D. R. I. 1961) with *Maryland Tel. Union* v. *Chesapeake & Potomac Tel. Co.*, 187 F. Supp. 101, 109 (D. Md. 1960) and *Philadelphia Dress Joint Board* v. *Sidele Fashions*, 187 F. Supp. 97 (E. D. Pa. 1960).

While a literal interpretation of an arbitration clause providing for arbitration of any dispute involving the interpretation or application of the contact might require submission of the question or arbitrability to the arbitrator, the Supreme Court has not placed such a construction on this provision when dealing with questions of substantive arbitrability. It said: "The Congress . . . has by section 301 of the Labor Management Relations Act, assigned the courts the duty of determining whether the reluctant party has breached his promise to arbitrate. For arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit."[11] Moreover, that the parties in this instance did not contemplate submission of the question of arbitrability to the arbitrator is evident from their contract; Article XV(2)(b) provides that if either party notifies the American Arbitration Association that in its opinion the issue is not arbitrable, the dispute shall not proceed to arbitration until a court has ruled on the question.

Although the Supreme Court has not ruled on procedural arbitrability, the rationale underlying its decision that the question of substantive arbitrability is for the court—namely, that a party can only be required to submit a dispute to arbitration if it has agreed to do so—would appear to apply equally whether the reluctant party con-

[11] *Warrior, supra*, at p. 582. See also, *Warrior*, n. 7, p. 583; concurring opinion of Justice Brennan in *American Mfg. Co., supra*, at 570-71; Cox, *supra*, 1508-09.

tends that it has not agreed to arbitrate a certain type of dispute or whether it contends that it has not agreed to to do so unless certain procedural conditions are complied with. However, the conclusion that questions of procedural arbitrability must be decided by the court would, in certain situations, be contrary to the arbitration philosophy that permeates the Court's arbitration decisions, to wit, that judges should defer to arbitrators on matters over which the latter possess special competence.[12] Thus, judicial determination of such questions in situations where the procedure is stated in general rather than specific terms and its application to a particular grievance requires consideration of factors which an arbitrator cognizant of the industrial context within which the agreement operates is particularly qualified to consider, or in situations where the alleged justification for non-compliance requires such consideration, would ill accord with a philosophy of judicial deference to arbitration.

Cox, while also of the view that the question of arbitrability is for the court, states: "This does not mean that the Court must decide every question antecedent to a determination of the merits of a grievance which might be thought to involve the arbitrability." And again, ". . . I suggest that the conventional arbitration clause limiting the arbitrator to disputes concerning 'interpretation and application' of the contract reserved the right to a judicial determination upon whether the arbitrator has jurisdiction over the subject matter but that all other questions—procedural, jurisdictional, or substantive—are solely within the power of the arbitrator to determine." Cox, *supra*, p. 1511.

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[12] The validity of the assumption that arbitrators possess a competence which judges lack is questioned by Hays, *supra* at pp. 930-35.

Perhaps the contrary results that flow from a consideration of the contractual nature of arbitration provisions and from a consideration of the unique role attributed to the arbitrator by the Supreme Court can be reconciled by an approach under which questions of procedural arbitrability that require resolution of problems similar to those usually handled by an arbitrator, that is, questions that require "the arbitrator to exercise the creative role his function demands," would be submitted to arbitration, reserving to the court questions that do not call for this special competence, as, for example, where the contract provides in specific rather than general terms the procedural requirements and the consequences of non-compliance.[13] Compare, Procedural Requirements of a Grievance Arbitration Clause: Another Question of Arbitrability, 70 Yale L. J. 611 (1961). While this approach will entail greater difficulty than a hard and fast rule either reserving all questions of procedural arbitrability to the courts or submitting all such questions to the arbitrator, I think it is more consonant with the views expressed by the Supreme Court in the *Steelworker* cases than either of the alternatives. This approach may also explain the different results reached by the various Circuits: With the exception of

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[13] *United Brick Workers* v. *Gladding McBean & Co.*, *supra*, illustrates a situation in which I think the question of procedural arbitrability was clearly for the court, as Judge Yankwich held. In that case the contract specifically provided that failure of the Union to process a grievance within the time limits specified in the various steps "shall render the grievance void" in the absence of a written extension of time. The Court also pointed out that the provision was put into the contract to tighten up a previously loose procedure; that the Union failed in its endeavor to prove a contrary practice constituting a waiver of this requirement, and that the Company had warned the Union in that grievance that if it wanted to appeal to Step Three it would have to do so within the time specified.

Boston Mutual,[14] which was decided before the *Steelworker* cases, the Circuits that decided questions of procedural arbitrability were all dealing with specific procedural provisions.

Applying the principle above stated to the procedural questions before me, I conclude that: The question whether grievances No. 4910 and No. 4928 were brought within a reasonable time and the question whether the Union's defense justifies its failure to take grievances No. 3970 and No. 3971 to Step 3 within three months, as required, should be decided by the arbitrator. The question whether the Union's failure to request a panel within ten days bars arbitration should be decided by the court.

The two grievances objected to on the ground that they were not presented within a "reasonable time after occurrence or knowledge of the situation" were presented approximately four and two years, respectively, after the events complained of are alleged to have occurred. National Docket No. 4910 involved failure to recall a senior employee to his job as Painter Leader while placing a junior employee on it. The petition alleges that the grievant had been laid off, that during this period he was transferred to another job, that in December of 1955 a junior employee was placed on his job and remained on it for two years, that the senior employee was unaware of it because the job to which he

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[14] *Boston Mutual* may also be read as leaving open the possibility that under some circumstances the question might be for the arbitrator. The Court stated:

> Where we part company with the district court is in its holding that the determination whether a reasonable time had elapsed in the present case "should be left for initial consideration by the arbitrator, and should not be foreclosed by a court decision preceding the arbitrator's opportunity to rule." The district court apparently would reach this conclusion not only where reasonable men might differ as to whether the Union had proceeded with sufficient diligence to press for arbitration by the American Arbitration Association, but also where no reasonable man could conclude that the Union had acted with due diligence. 353 F.2d 321

had been transferred was in a different building ten miles distant from the building in which he had worked as a Painter Leader, and that he did not learn of it till 1959, when the grievance was filed. National Docket No. 4928 involves the downgrading of a senior employee to a lower classification than that to which a junior employee had been downgraded during a slack period. Again, the Union claims that the senior employee was unaware of the situation at the time and that the grievance was filed as soon as he learned of it. By providing for the presentation of grievances within "a reasonable time" the parties purposely formulated a flexible rule that would permit consideration of facts such as those alleged by the Union in justification of the delay. I think that an arbitrator, familiar with the industrial context within which these grievances occurred, is particularly qualified to determine when the aggrieved employee acquired knowledge of the situation and if he delayed thereafter whether the delay was reasonable.

While the procedural requirement violated by the Union in National Docket Nos. 3970 and 3971 is specific, the defense urged in justification of non-compliance requires consideration of factors more appropriate for the arbitrator. These grievances involved a complaint by two employees laid off because they lost their privileged position when the Company refused to recognize their status as stewards after it placed two groups of employees under a single foreman. The question presented was whether a union is required to eliminate a steward when the company combines groups of employees and eliminates a foreman. The Union's justification for non-compliance is that it held the grievance in abeyance pending the determination of the identical issue in another arbitration proceeding. Questions such as what effect a determination between other parties would have had on the grievance negotiations between the Union and Company here, whether it is usual

for parties to consider arbitration decisions in their efforts to resolve grievances, and whether the Union should have notified the Company of its intention to hold the matter in abeyance, all relevant to a decision on whether the non-compliance was justified: are considered in light of the recent Supreme Court decisions, questions on which the court should defer to an arbitrator.

In contradistinction to the above procedural questions, the provision for the request of a Panel is specific and does not require consideration of factors peculiar to industrial relations. The Union does not deny its failure to request a Panel within ten days, but contends that the provision is permissive rather than mandatory, emphasizing the word "may"; that the provision has been ignored for many years; and that the rules of the American Arbitration Association render such a request unnecessary. The Union does not suggest why a permissive provision was thought necessary nor what meaning could be attributed to the ten day limitation under such a construction. I shall not consider whether the provision was nullified by a contrary practice—a question which, were it necessary to the decision, would have been more appropriate for consideration by the arbitrator—because I think the Union's last point disposes of this objection. The courts have repeatedly held the literal compliance is not required where it would have served no purpose. *International Ass'n of Machinists* v. *Haues Corp., supra; Southwestern Electric Power Co.* v. *Local No. 738 International Bhd. of Elec. Workers, supra; General Tire & Rubber Co.* v. *Local 512, United Rubber Workers, supra; International Union of Operating Eng'rs* v. *Monsanto Chemical Co.*, 164 F. Supp. 406 (W. D. Ark. 1958). But see *United Brick Workers* v. *Gladding McBean & Co., supra*;[15] *Local 201, International Union of Elec. Workers* v. *General Electric Co.*, 171 F. Supp. 886 (D. Mass. 1959). In *International Ass'n of Machinists* v. *Haues Corp., supra*, the

[15] See note 13, *supra*.

contract provided that the decision at Step 3 of the grievance procedure was final unless arbitration was invoked by written notice within 20 days. The employer was doing work for the Government and the dispute involved the discharge of an employee at the Government's direction. Written notice was not given until nine months after the employer had rejected the grievance on the ground that it was not subject to the grievance procedure. The Court ordered arbitration, stating:

> Since it is plain from this record that a formal written demand for Post-Step 3 arbitration would have received the same treatment as the original demands, the employer ought not to be able to insist on useless, formal, literal compliance, as a condition for the judicial determination of the [question of substantive arbitrability]. (p. 243).

In response to my inquiry, counsel for the American Arbitration Association informed me that where the contract provides for arbitration to be administered by the American Arbitration Association, "a request to initiate the proceedings by one party to that contract is sufficient to set in motion the complete procedures for holding hearings. This includes sending names of persons chosen from our panels, from which the parties may make a mutual selection." From this letter, and the Labor Arbitration Rules of the American Arbitration Association,[16] it is evi-

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[16] Rule IV, subdivision 12, provides:

> *Appointment from Panels*—If the parties have not appointed an Arbitrator and have not provided any other method of appointment, the Arbitrator shall be appointed in the following manner: Immediately after the filing of [demand for arbitration], as required under Rule III, the Tribunal Clerk shall submit simultaneously to each party to the dispute, an identical list of names of persons chosen from the Panels. Each party to the dispute shall have seven days from the date of mailing of such lists in which to examine

dent that a request for a Panel was entirely unnecessary and, had the Company not objected to arbitration of these disputes, a Panel would have been submitted to the parties by the Association as part of its regular procedure in processing a request for arbitration. To permit non-compliance to bar arbitration under these circumstances would be contrary to everything the Supreme Court has said about labor arbitration.[11]

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said list, cross off any names to which he objects and number the remaining names indicating the order of his preference, and return the lists to the Tribunal Clerk. When any party or both parties fail to return the list within the time specified, all persons named therein shall be deemed acceptable. From among the persons who have been approved on both lists, and in accordance with the designated order of mutual preference if any, the Tribunal Clerk shall invite the acceptance of an Arbitrator to serve. If the parties fail to agree upon any of the persons named, or if those named decline or are unable to act, or if for any other reason the appointment cannot be made from the submitted lists, the Administrator shall have power to make the appointment from other members of the Panels without the submission of any additional lists.

[11] The Company places heavy reliance on the decision in *Local 783, Allied Industrial Workers* v. *General Electric*, Civil No. 800, W. D. Ky., April 21, 1959, in which the Court construed the identical provision and held that the "arbitration provisions of the collective bargaining agreement are unenforceable for failure to comply with an essential procedural requirement." Its reason for so holding was that "unless the 10 day limitation is held to be a binding prerequisite of the arbitration process, the parties might never know whether a claim has been definitely abandoned or whether it would be called up at some future date. This is exemplified in the present case where one of the grievances involved dates to January 29, 1953, which is more than five years prior to the filing of this suit." I respectfully suggest that the Court erred in its understanding of the agreement. The 10 day limitation is for a request for a Panel after a request for arbitration has been made and not for the institution of an action to compel arbitration. Thus, had the Union requested a Panel within 10 days and had the Employer notified the American Arbitration Association that it considered the dispute non-arbitrable, this requirement would have been complied with but the employer would have been no better informed on whether the claim had been abandoned or whether the Union

Opinion and Order of the District Court for the Southern District of New York.

SUBSTANTIVE ARBITRABILITY.

Article XV of the Collective Bargaining Agreement between the Company and the Union provides:

> 1. Any grievance which remains unsettled after having been fully processed pursuant to the provisions of Article XIII; and which involves either,
>
> (a) the interpretation or application of a provision of this Agreement, or (b) a disciplinary penalty (including discharge) imposed on or after the effective date of this Agreement, which is alleged to have been imposed without just cause,
>
> shall be submitted to arbitration upon written request of either the Union or the Company. . . .
>
> . . . . . .
>
> 3.(b) It is specifically agreed that no arbitrator shall have the authority to establish or modify any wage, salary or piece rate, or job classification or authority to decide the appropriate classification of any employee. Subject to the foregoing limitations on the authority of an arbitrator, nothing in this subsection (b) shall prevent arbitration of a grievance involving a violation of this Agreement.

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intended to institute a court action to compel arbitration. In the case at bar the Company notified the American Arbitration Association that it did not consider the dispute arbitrable even though more than 10 days had elapsed without a request for a Panel by the Union. See Chart in note 10, *supra*. Once it had so notified the Association it knew that under the agreement arbitration could not proceed without a court order and the Association so notified it. The Collective Bargaining Agreement does not specify the time within which an action to compel arbitration must be brought, nor does the Company object to arbitration on the ground that the action to compel it is belated.

The Company correctly argues that section 3(b) excludes from arbitration a number[18] of the grievances, because their resolution would require the arbitrator to establish or modify the wage, piece rate, or job classification established by the Company. It also objects to arbitration of one of these grievances on the ground that it does not involve interpretation or application of a provision of the agreement[19] and to another on the ground that it is excluded from arbitration by virtue of a clause which vests authority over the question in management.[20] Before detailing the facts of these grievances it may be appropriate to review the Supreme Court's decisions in the *American Mfg.* and *Warrior* cases, *supra*.

In the *American Mfg.* case, the Union brought suit to compel arbitration of a grievance that challenged the Company's refusal to reinstate an employee who had suffered an injury which, in the opinion of his doctor, resulted in a 25% permanent partial disability and for which he had settled a compensation claim against the employer on that basis. In reversing the District Court and Circuit Court refusal to compel arbitration, the Supreme Court stated:

> The function of the Court is very limited when the parties have agreed to submit all questions of contract interpretation to the arbitrator. It is confined to ascertaining whether the party seeking arbitration is making a claim which, on its face, is governed by the contract. (p. 567-68).

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[18] National Docket No. 4485, Local No. 201, West Lynn, Mass., National Docket No. 4665, Local No. 320, Syracuse, N. Y., National Docket No. 3830, Local No. 248, Burlington, Vt., National Docket No. 5039, Local No. 119, Philadelphia, Pa., National Docket No. 4922, Local No. 320, Syracuse, N. Y., and National Docket No. 4553, Local No. 201, West Lynn, Mass.

[19] National Docket No. 3830, Local No. 248, Burlington, Vt.

[20] National Docket No. 4485, Local No. 201, West Lynn, Mass.

And, apparently, a claim may be governed by the contract even if not governed by specific language in the contract for the opinion goes on to state: "The courts . . . have no business . . . determining whether there is particular language in the written instrument which will support the claim."[21]

In concluding, the Court said:

> The union claimed in this case that the company had violated a specific provision of the contract. The company took the position that it had not violated that clause. There was, therefore, a dispute between the parties as to "the meaning, interpretation and application" of the collective bargaining agreement. Arbitration should have been ordered. When the judiciary undertakes to determine the merits of a grievance under the guise of interpreting the grievance procedure of collective bargaining agreements, it usurps a function which under that regime is entrusted to the arbitration tribunal (363 U. S. 569).

In *United Steelworkers v. Warrior & Gulf Navigation Co., supra*, the Union sought to compel arbitration of a grievance challenging the Company's right to contract out work formerly done by members of the bargaining unit. Despite the absence of any language in the contract relating to contracting out and despite a history of negotiations in which the Union unsuccessfully sought to obtain a provision prohibiting contracting out, the Court held the grievance arbitrable. The Court stated:

> [T]o be consistent with Congressional policy in favor of settlement of disputes by the parties through the machinery of arbitration, the judicial inquiry

[21] Compare Cox pp. 1490-1500, 1512-13. But see Hays, p. 922, who shows the problems to which the logical conclusion of such a position may lead.

under §301 must be strictly confined to the question whether the reluctant party did agree to arbitrate the grievance or *did agree to give the arbitrator the power to make the award he made.* An order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage.

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. . . the Court should view with suspicion any attempt to persuade it to become entangled in the construction of the substantive provisions of a labor agreement even through the back door of interpreting the arbitration clause, when the alternative is to utilize the services of an arbitrator (pp. 582-83).

In a recent decision of this Circuit, the Court said:

> The nub of the matter is that under the broad and comprehensive labor arbitration clause every grievance is arbitrable, unless the provisions of the collective bargaining agreement concerning grievances and arbitration contain some clear and unambiguous clause of exclusion, or there is some other term of the agreement that indicates beyond peradventure of doubt that a grievance concerning a particular matter is not intended to be covered by the grievance and arbitration procedure set forth in the agreement. *The Procter & Gamble Independent Union* v. *The Procter & Gamble Mfg. Co.*, 298 F. 2d 644, 645 (2d Cir. 1962).

The Facts of the Grievances Involved. National Docket No. 4485 involves a refusal by the Company to reinstate an employee as a sheet metal worker, despite his seniority

rights, on the ground that he was physically unable to perform the work. The petition alleges that the employee had worked as a sheet metal worker for about eight months; that he was laid off because of a lack of work; and that when other employees with less seniority were recalled, he was told that he could not be placed in his former job because of his physical condition. The Company contends that arbitration of this grievance would require the arbitrator to "determine proper classification" and that a provision of the local supplement vests exclusive authority to determine physical disability in the Company.

National Docket No. 4665 protests the Company's failure to pay certain employees the wage to which their classification entitled them under the agreement and its failure to advance the wages of these employees pursuant to the progression schedules of the agreement. The petition alleges that the Company hired employees as No. 1762 Testmen, which carried an R-19 classification, and paid them R-16 rates, the rate applicable to 1763 Testmen, that it thereafter failed to advance their wages, and that the Company continues to engage in this practice. The Company contends that arbitration of this grievance would be contrary to the provision that no arbitrator shall have authority to establish or modify job classifications, or wages, or to determine the appropriate classification of an employee.

National Docket No. 3830 protests the Company's action in reducing the pay rate of two employees. The petition alleges that these employees had been classified as R-17 Millwrights for approximately 9 years; that during a heavy layoff they worked in a lower classification; and that thereafter they were returned to perform the duties they had performed as Millwrights but were classified as Machine Repairmen R-12, and paid at a lower rate. The Company takes the position that this grievance does not involve interpretation or application of the contract and that it would require the arbitrator to determine proper wages and job classifications.

National Docket No. 5039 involves an allegation of improper retroactive deductions from the earnings of sixteen employees. These employees worked on experimental jobs to which they were transferred under agreed terms of compensation. Two of the employees on the experimental job had complained that their earnings on the experimental job were less than their average earnings on their regular jobs. After considering their grievance the Company paid them the difference between what they had actually earned and their average earnings on their regular job. Thereafter the Company recomputed the wages of 23 other employees on the experimental job and deducted the excess from later checks of those 16 who had earned more on the experimental job than their average earnings on their regular jobs. The grievance complains of these deductions. The Company contends that arbitration of this grievance would violate the provision that an arbitrator has no authority to modify wages.

National Docket No. 4922 protests the removal of employees from the production and maintenance unit and the conversion of their jobs from hourly pay to salary without any change in their duties. The petition alleges that employees classified as No. 8323 Crystal Processors, R-10, have historically been in the production and maintenance Unit, that the Company removed these employees from the Unit in violation of Article I(b), providing for Union recognition, and that it thereafter laid off some of the employees in violation of their contract rights. The Company position is that the subject matter of this grievance is within the exclusive jurisdiction of the NLRB,[22] and that the grievance is barred from arbitration because it would require the arbitrator to decide the appropriate classification of employees.

National Docket No. 4557 protests the promotion of one employee to an R-14 opening despite the claim to the job

[22] This objection is discussed, *infra*, under NLRB jurisdiction.

by another employee who, the Union contends, had greater seniority rights. The Company claims that arbitration of this grievance would require the arbitrator to determine the proper classification of an employee, that the subject matter of the grievance is within the exclusive jurisdiction of the NLRB,[23] and that the claim is based on an illegal contract provision.[24]

Article XV(3)(b). To construe section (3)(b) as the Company urges would be to permit the exception to swallow the whole. The contract between the Company and the Union contains detailed provisions relating to working conditions, service credits, ingrade progression, reduction and increase of forces, and detailed tables on the compensation of salaried and hourly rated employees. The grievances allege violation of these provisions. National Docket No. 4485 alleges violation of seniority rights in lay-off and rehire; National Dockets Nos. 4665, 3830 and 5039 allege violation of provisions relating to compensation; National Docket No. 4922 alleges violation of compensation and lay-off provisions and of the Union recognition clause; National Docket No. 4657 alleges violation of seniority rights in promotion. These grievances involve the application of provisions which are the foundation of any labor agreement. An interpretation of Article XV(3)(b) which would exclude them from arbitration would leave the Union dependent on the Company's good faith for the rights that are at the heart of the agreement, with resort to a strike as the only means of enforcement in case of a breach. It is hardly conceivable that the parties contemplated such a result.

The Union also urges that Article XV(3)(b) constitutes a limitation on the authority of the arbitrator, not a bar to arbitration. This position finds support in the fact that in what appears to be a very carefully drawn contract, other

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[23] *Id.*

[24] *Id.*

provisions, not relevant here, state specifically that certain matters are excluded from arbitration.

The function of the arbitrator in resolving these grievances will not be to establish or modify any wage, salary, piece rate, or job classification, but to determine whether the wage, rate, or job classification prescribed by the contract was applied in the particular cases before him. See *Radio Corporation of America v. Association of Professional Eng'r Personnel; supra.*

While such a construction may leave little of the exception, it is preferable to a construction that would permit the exception to vitiate the contract. *Cf. Lummus Co. v. Commonwealth Oil Refining Co.*, 297 F. 2d 81, 93 (2d Cir. 1961). Whatever disposition might have been made of the Company's objection prior to the *Steelworker* decisions, it is clear that it must be rejected when considered in the light of these decisions and the recent decision of this Circuit in the *Procter & Gamble* case, *supra.*

Other objections. The other reasons urged by the Company in support of its contention that the arbitration provision does not apply to two of these grievances—in the case of National Docket No. 3830 that it does not involve the interpretation or application of a provision of the agreement, and in the case of National Docket No. 4485 that the contract vested the Company with authority to determine physical ability—must likewise be rejected.

In National Docket No. 3830 the Union does allege that the Company violated a provision of the agreement. It alleges violation of Article VI(5) (a) (4), providing step rates and progression schedules. In *American Mfg.* the Supreme Court said that if the "Union claimed . . . that the Company had violated a specific provision of the contract" and the "company took the position that it had not," there was a dispute between the parties as to "the interpretation and application of the collective bargaining agree-

ment."[25] Moreover, the Supreme Court admonished the courts not to concern themselves with "whether there is particular language in the instrument which will support the claim."[26] Professor Cox points out that a number of characteristics distinguish collective bargaining agreements from other contracts, necessitating broad and flexible provisions and the omission of much detail in the former. Therefore, "the 'interpretation and application' of a collective bargaining [agreement cannot be] limited to documentary construction of language."[27] Indeed, it is difficult to conceive of anything more clearly within the scope of a collective bargaining agreement than the rates payable to employees.

The Company's contention that the grievance alleged in National Docket No. 4485 is non-arbitrable because its determination of physical disability is final, is based on the following provisions of the Local Supplement:

> An employee with a physical limitation as determined by the Company Dispensary will be transferred to a suitable available classification under the steps of this procedure.

This clause is contained not in an arbitration provision but in one concerned with the transfer of employees under various circumstances. In order to hold, as the Company urges, that this provision bars arbitration, I would have to construe it as making the Company Dispensary determination final and absolute, and not subject to challenge under any circumstances. This would involve the court "in the construction of the substantive provisions of [the] agreement . . . through the back door of interpreting the arbitration clause." Since there is here neither an "express

[25] P. 569. See also *Warrior*, *supra*, at p. 585.

[26] *American Mfg.*, at p. 568.

[27] Cox, *supra*, pp. 1490-1500, 1512-13.

provision excluding [the] particular grievance from arbitration," nor "the most forceful evidence of a purpose to exclude the claim from arbitration,"[28] the grievance must be held arbitrable. Moreover, were the substantive question before me, I would not hold that this provision was intended to modify the arbitration provision.

National Docket No. 4454 may most appropriately be discussed here. It protests the Company's assignment of apprentices to jobs of craft helpers in lieu of recalling laid off craft helpers. The Company's contention that by virtue of a letter amending the Local Supplement the Company "was perfectly within its rights" in acting as it did, goes to the merits of the grievance and cannot be considered by the court. The Supreme Court specifically rejected the *Cutler-Hammer* doctrine as one that "could only have a crippling effect on grievance arbitration."[29]

NLRB Jurisdiction

The Company contends that the subject matter of four[30] of the grievances is within the scope of NLRB jurisdiction and that this precludes their resolution by arbitration. National Docket No. 4922, discussed above, protests the Company's removal of employees from their bargaining unit; National Docket No. 4114 protests the Company's refusal to recognize the Union as the bargaining representative for and to apply the contract to employees who were outside the Unit but were working alongside of employees in the Unit and performing what is claimed to be bargain-

[28] *Warrior*, *supra*, p. 585.

[29] *American Mfg.*, *supra*, p. 567.

[30] National Docket No. 4922, Local No. 320, Syracuse, N. Y.; National Docket No. 4114, Local No. 255, Pittsfield, Mass.; National Docket No. 4557, Local No. 201, West Lynn, Mass.; and National Dockets Nos. 4606, 4607, 4608, 4609, 4610 and 4611, Local No. 1081, DeKalb, Ill.

ing unit work. National Dockets Nos. 4606 through 4611 involve assignment of work claimed by the Maintenance Plumbers Unit to a different Unit represented by a different Union; and National Docket No. 4557, discussed above, protests the Company's crediting an employee with total length of continuous service even though he belonged to a different union during part of it.

The Company's contention poses the question whether an alleged breach of contract which involves conduct that is within the scope of NLRB jurisdiction is arbitrable. The question is a difficult one because an answer either way gives rise to further problems. To hold that such disputes may only be determined by the Board would greatly increase its burden, require it to resolve controversies that may not have any national significance, and probably delay the settlement of the disputes. If, on the other hand, such disputes are held arbitrable the question arises whether the party dissatisfied with the arbitration result is then free to proceed before the Board, and the effect of the arbitrator's decision and the Board's decision if they are contrary. For, if the arbitrator's decision is final only if the losing party wants it to be so, the effectiveness of arbitration will be greatly diminished.

While the decisions are by no means uniform, courts have compelled arbitration in a number of cases where the alleged breach of contract could clearly have also been a basis for an unfair labor charge before the Board. *United Steelworkers* v. *New Park Mining Co.*, 273 F. 2d 352 (10th Cir. 1959); *Lodge No. 12, Int'l Assn. of Machinists* v. *Cameron Iron Works*, 257 F. 2d 467 (5th Cir. 1958); *United Elec. Workers* v. *Worthington Corp.*, 236 F. 2d 364 (1st Cir. 1956); *Freight Drivers Union* v. *Quinn Freight Lines*, 195 F. Supp. 180 (D. Mass. 1961); *Retail Shoe & Textile Salesmen's Union* v. *Sears Roebuck*, 185 F. Supp. 558 (N. D. Cal. 1960). The Supreme Court has not ruled on the question

but it has recently cited with approval [31] some of the above cases and Dunau's article, Contractual Prohibition of Unfair Labor Practices: Jurisdictional Problems, 57 Col. L. Rev. 52 (1957), which has as its thesis that Board jurisdiction should not bar arbitration.

National Docket Nos. 4606 through 4611 present a more vexing problem, because the Union, representing the employees who were given the work, allegedly in contravention of the contract, will not be represented in the arbitration proceeding and will not be bound by its result. In the *Quinn Freight Lines* case, *supra*, the Court held that absence of the second Union from the arbitration proceeding did not deprive the Union of its contractual right to arbitrate the dispute. In *Local 1357, Retail Clerks Int'l Ass'n v. Food Fair Stores*, 42 CCH Labor Cases (E. D. Pa. 1961), however, the Court denied the Union's motion to compel arbitration of its claim that the contract entitled it to represent employees in a new store. Two important considerations differentiate the latter case from the case at bar. First, enforcement of the Union's claim in the *Food Fair* case would have, in effect, permitted the Union and the employer to contract to deprive employees of their right to elect a collective bargaining representative. Secondly, in the *Food Fair Stores* case, as well as in *National Labor Relations Board v. Weyerhauser Co.*, 276 F. 2d 865 (7th Cir. 1960), and in *International Union of Doll & Toy Workers v. Metal Polishers Union*, 180 F. Supp. 280 (S.D. Cal. 1960), cited by the Company, the court was dealing with cases in which NLRB jurisdiction had already been invoked. Here NLRB jurisdiction has not been invoked and cannot be invoked under the present state of the facts. Thus, while arbitration between the Company and the Union may not resolve the underlying dispute, and may therefore

[31] See footnote 9 in Local 174, *Teamsters v. Lucas Flour Co.*, *supra*.

not have the salutary effect of assuring industrial peace ascribed to arbitration by the Supreme Court, the alternative of submitting the question to a tribunal which would have jurisdiction over both Unions and would be in a position to resolve the underlying dispute is not available. Under section 10(k) of the Taft-Hartley Act, 29 U. S. C. 160(k), the Board is empowered to hear and determine jurisdictional disputes only when an unfair labor practice under section 8(b)(4)(D) is charged. Since the Union here has not engaged in the conduct prohibited by section 8(b)(4)(D), the NLRB would not have jurisdiction over its claim. See *Local 33, International Hod Carriers Union* v. *Mason Tenders District Council*, 291 F. 2d 196 (2d Cir. 1961). In the absence of an alternative that would assure final resolution of the problem, I see no reason to deny resort to a means of resolving the immediate controversy. Moreover, denial of arbitration would have the paradoxical result of forcing the Union to engage in conduct prohibited by 8(b)(4)(D) as the only means of obtaining adjudication of its claim to this work.

National Docket No. 4557 presents a different problem. The Union does not dispute that the employee who was given the job would be senior to the employee who it claims should have been given the job if the former were credited with total length of continuous service. It contends, however, that in crediting him with time during which he worked in a different Unit, belonging to a different Union, the Company violated Article XI(3). Article XI(3) provides:

> Employees who have been or may be transferred to jobs outside the bargaining unit may be returned to their former classification in the bargaining unit in accordance with total length of continuous service. Employees in any plant who have been certified in a bargaining unit not covered by this Agreement shall have no rights under this Agreement.

The result of this clause is to preserve seniority rights of employees who leave the unit but do not join another union while denying this privilege to employees who do join another union. The Board held a similar provision to be an unfair labor practice and ordered the employer to cease and desist from giving effect to it and to restore the seniority rights of the employees to whom this provision had been applied. Its decision was affirmed by the Court of Appeals, *NLRB* v. *International Ass'n of Machinists*, 279 F. 2d 761 (9th Cir. 1960), on the ground that a natural consequence of that provision would be to discourage employees from seeking new union representation upon transfer to other units. The provision quoted above, on which the Union here relies, would also have the effect of discouraging membership in other unions and must likewise be held to violate the Act. The Union's claim under that provision must therefore be denied. *Ex pacto illicito non oritur actio.*

I am not unmindful of the fact that in holding the provision unlawful and denying arbitration of the grievance based upon it, I am substituting the Court's decision for that of the tribunal bargained for by the parties. I think, however, that it would be incongruous for the court to lend its assistance to a party seeking to enforce an unlawful claim by compelling the other party to arbitrate it.

COURT PROCEDURE.

Lastly, a word concerning the Company's objection to the procedure in this court. This action was brought by a petition to compel arbitration, the appropriate procedure in the New York courts where the action was originally commenced. N. Y. Civil Practice Act § 1450. It is respondent's position, however, that upon removal of the action to this court the petition should have been treated as a complaint, respondent should have been given an opportunity to file an answer, and thereafter petitioner could have made any motion it deemed appropriate.

Opinion and Order of the District Court for the Southern District of New York.

The action was removed to this court on October 16, 1961. On October 19, 1961, respondent moved to amend the complaint. This motion was argued before Judge Feinberg on November 6, 1961 and was denied on December 11, 1961. The instant motion was noticed for November 14, 1961, but as a result of numerous adjournments, it was first argued on December 12, 1961. Respondent filed a twenty-six page paper, denominated by it as the answer, containing admissions and denials of and affirmative defenses to the allegation in the petition. Both sides have filed voluminous briefs.

In objecting to the procedure followed, respondent does not claim that it would have submitted additional papers or that it was deprived of an opportunity to present a defense which it could have presented under the procedure it suggests. I can see no way in which respondent was prejudiced by the procedure followed. Nor, indeed, does respondent claim prejudice. Its claim is that the procedure was improper and that therefore the motion should be dismissed. Contrary to respondent's contention, it is not clear that the procedure followed was inappropriate, see *Engineers Ass'n* v. *Sperry Gyroscope Co.*, 251 F. 2d 133, 136-37 (2d Cir. 1957); *Minkoff* v. *Scranton Frocks*, 172 F. Supp. 870, 877 (S. D. N. Y. 1959); see also *Kreindler* v. *Clarise Sportswear Co.*, 184 F. Supp. 182 (S. D. N. Y. 1960); but see *Local 596, International Ass'n of Machinists* v. *General Electric*, 37 CCH Labor Cases ¶65, 658 (N. D. N. Y. 1959), and I decline to dismiss the motion on that ground in the absence of a showing that respondent was prejudiced thereby.

Motion to compel arbitration granted except for National Docket No. 4557.

Submit order on notice.

Dated: New York, N. Y.
April 19, 1962.

EDMUND L. PALMIERI,
U. S. D. J.

Opinion of the United States Court of Appeals for the Second Circuit.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 222—October Term, 1962.

(Argued January 23, 1963 Decided March 11, 1963)

Docket No. 27652

IN THE MATTER

of

JAMES B. CAREY, as President of INTERNATIONAL UNION OF ELECTRICAL RADIO AND MACHINE WORKERS, AFL-CIO,

Appellee,

v.

GENERAL ELECTRIC COMPANY,

Appellant.

Before:

FRIENDLY, KAUFMAN and MARSHALL, *Circuit Judges.*

Cross appeals from an order of the District Court for the Southern District of New York, Edmund L. Palmieri, J., submitting to arbitration certain grievances under a collective bargaining agreement.

Order modified: all grievances to be submitted to arbitration.

DAVID L. BENETAR, of Nordlinger, Riegelman, Benetar & Charney, New York, N. Y. (Thomas F. Hilbert, Jr., H. H. Nordlinger, Robert C. Isaacs, of counsel), *for appellant.*

LIEBERMAN, KATZ & ARONSON, New York, N. Y., and Benjamin C. Sigal, Washington, D. C. (Isadore Katz, on the brief), *for appellee.*

Opinion of the United States Court of Appeals for the Second Circuit.

KAUFMAN, *Circuit Judge:*

This case comes before us on cross appeals from the disposition by Judge Palmieri, in the United States District Court for the Southern District of New York, of a petition to compel arbitration of twelve labor grievances. The International Union of Electrical, Radio and Machine Workers, AFL-CIO, through its president, James B. Carey, instituted this proceeding in the New York Supreme Court, and the defendant, General Electric Company, elected to remove the case to the District Court by invoking section 301(a) of the Labor-Management Relations Act, 29 U. S. C. §185. See 28 U. S. C. §§1441, 1446. The grievances in question arise under the collective bargaining agreement between General Electric and the union, as well as certain local supplement agreements controlling in various plants throughout the country. Over the employer's objections that these grievances were without the jurisdiction of the arbitrator for several reasons—failure to comply with procedural conditions precedent, express exclusion from arbitration in the collective agreement, conflict with the exclusive jurisdiction of the National Labor Relations Board—Judge Palmieri, in a thorough opinion, ordered that the merits of all grievances except one be submitted for determination to the arbitrator. General Electric Company, hereafter referred to as the employer, asserts that Judge Palmieri erred in submitting any issues to arbitration; the union, in its cross appeal, asserts that he erred in withholding the one grievance from arbitration.

We modify and affirm the order of the District Court on the appeal of General Electric, and reverse the ruling of the court on the union's cross appeal.

I.

We shall first dispose of those objections to arbitration which rest upon the assertion that the union or the grieving employee failed to take timely action as stipulated in

the collective bargaining agreement. Article XIII of the collective agreement establishes a three-step grievance procedure for the peaceful resolution of individual grievances. It provides that a grieving employee, within a reasonable time after the occurrence or knowledge of the aggrieving condition, may complain of it to his foreman or other immediate supervisor. If unresolved, the grievance may be carried to the second stage, presentation by a local union official to a representative of local management. If no settlement is reached after step two, the grievance may be referred by union "headquarters", the National Officers, to management "headquarters," an Executive Officer of the company. The collective bargaining agreement further provides that the step-three submission to the company shall be made "not more than three months after the completion of discussions and the final decision of local Management at Step Two."

The relevant portions of the arbitration provisions (Article XV) stipulate that "any grievance which remains unsettled after having been fully processed pursuant to the provisions of Article XIII, and which involves * * * the interpretation or application of a provision of this Agreement * * * shall be submitted to arbitration upon written request of either the Union or the Company, provided such request is made within 30 days" after a step-three decision by the company officials. Article XV-2(a) continues, "Within 10 days following a written request for arbitration of a grievance, the Company or the Union may request the American Arbitration Association to submit a Panel of names from which an arbitrator may be chosen."

The employer contends that two grievances—National Docket Nos. 4910 and 4928, both involving an employee's assertion that he has rightful claim to a position presently occupied by a junior employee—have been rendered non-arbitrable because not presented by the employee "within a reasonable time after the occurrence or knowledge of the

situation. . . . The employer alleges that four and two years, respectively, transpired between the occurrence of the events complained of and the presentation of the grievance. The union answers that the presentation was timely in each case, because the senior employee did not know of the aggrieving condition for the extended time period in question and because each filed his grievance immediately upon learning of it.

Two other grievances—National Docket Nos. 3970 and 3971, consolidated as one in the union's petition to compel arbitration—spring from the laying off of two individuals whom the company refused to recognize any longer as stewards after it placed two groups of employees under a single foreman. The company claims that these grievances have been rendered nonarbitrable by the union's failure to comply with step three of the grievance procedure, which as we have seen requires reference to company headquarters within three months after a step-two decision by local management. The union justifies its non-compliance with the three month provision on the ground that resolution of the identical substantive issue was then pending in another arbitration proceeding; this, claims the union, was sufficient to warrant abeyance of the grievance procedure here.

Of seven grievances,[1] the employer contends that the union failed timely to request a panel from the American Arbitration Association within ten days from the date of a written request for arbitration. The union seeks to justify the untimely request by the fact, *inter alia*, that the Association will automatically and without request submit a list of potential panel members for the arbitral tribunal.

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[1] National Docket Nos. 4454, 4601-11, 4665, 4910, 4922, 4928, 5039. No. 4454 protests the assignment of apprentices to jobs of laid-off craft helpers. The facts of the remaining six grievances are set out in other parts of this opinion.

The union also asserts that the ten-day limitation was merely permissive and was not a mandatory condition precedent to arbitration, and that the provision has been effectively ignored for many years.

Judge Palmieri, noting the split of authority on whether compliance with purported conditions precedent was to be determined by the court or by the arbitrator, held that questions of "procedural arbitrability" requiring some special expertise or familiarity with plant conditions and practices, would be determined by the arbitrator, but reserved for the courts "questions that do not call for this special competence, as, for example, where the contract provides in specific rather than general terms the procedural requirements and the consequences of non-compliance." He accordingly submitted to arbitration the questions whether an employee had presented his grievance "within a reasonable time" after occurrence or knowledge thereof, and whether the union's delinquency in invoking step three of the grievance procedure was excused by the pendency of arbitration proceedings. He reserved for himself the question whether the union's failure to request an arbitration panel was rendered immaterial by the automatic furnishing of such a list by the American Arbitration Association. He answered the question in the affirmative, and finding no procedural impediment to arbitration of the seven grievances involved, ordered that they be submitted to arbitration.

At the time of Judge Palmieri's decision, this Court had been silent on the question of procedural arbitrability. Our silence on this difficult problem in labor law has since been broken by the clear and positive language of *Livingston* v. *John Wiley & Sons, Inc.*, ___ F. 2d ___ (2d Cir. Jan. 11, 1963). Holding that the question of compliance with conditions precedent was a matter solely for the arbitrator to decide, Judge Medina, speaking for a unanimous court, noted that

Opinion of the United States Court of Appeals for the Second Circuit.

"It is of the essence of arbitration that it be speedy and that the source of friction between the parties be promptly eliminated * * *. The numerous cases involving a great variety of procedural niceties * * * make it abundantly clear that, were we to decide that procedural questions under an arbitration clause of a collective bargaining agreement are for the court, we would open the door wide to all sorts of technical obstructionism." *

The Court continued:

"It is for this reason that we cannot agree to the distinction propounded by Judge Palmieri in his very excellent discussion in *Carey* v. *General Electric Co.* * * * between matters of procedural compliance requiring the expertise of the arbitrator for decision and those which the courts are capable of deciding on their own. If the court must first decide whether a particular procedural problem calls for the special abilities and knowledge of an arbitrator, there will be inevitable delay. Such a practice, if followed, would develop a whole new body of decisional law, with the usual distinctions and refinements. Moreover, we have serious doubts that the suggested distinction between different types of procedural questions arising out of the abritration clauses in collective bargaining agreements can be placed upon any tenable and rational basis. In any event, it is clear that the practical consequences of attempts by the courts to apply such a distinction would be delay and prejudice to the speedy and effective arbitration which we believe the national policy calls for."

We need add little to what has already been said in the *Livingstone* case. The difficulties involved in the dichotomy suggested by Judge Palmieri are clearly evident in the very

case before us. Even were we to assume that contract conditions precedent could, on their face, be divided into those whose terminology is open-ended, warranting the arbitrator's special competence for interpretation, and those well-defined provisions meet for judicial interpretation, we would often have to go further, and characterize the union's reasons for non-compliance. Thus, it was determined below that the three-month provision involved in National Docket Nos. 3970 and 3971 was specific, but that the union's defense of pending proceedings "requires a consideration of factors more appropriate for the arbitrator." If the court must characterize not only the contract provision asserted to be a condition precedent but also each of the union's justifications or excuses for untimeliness, the arbitral wheels would very soon grind to a halt.

As noted in *Livingston*, the underlying premise behind Judge Palmieri's scheme of characterization is also subject to question; for what is a "specific" contract term? If, as an illustration, an employee must take certain action "within five days," does this not raise the question whether the parties to the collective bargaining agreement intended that the measuring rod be working days rather than calendar days; or, whether the period was intended to be tolled for certain occurrences, such as a strike; or, whether the five-day restriction was illusory under any circumstances, because customarily ignored in the plant?

We therefore affirm that portion of Judge Palmieri's order which submitted to arbitration the "procedural" aspects of Docket Nos. 4910, 4928, 3970, 3971, reverse that portion of his order holding that the union was excused from making a timely request for a panel of arbitrators, and order that the latter question be submitted to the arbitrator for decision.

II.

The company's second attack upon the union's attempt to secure arbitration employs as its weapon Article XV-3(b) of the collective bargaining agreement, which the company asserts excludes from arbitration six of the union's grievances. The specific facts of the grievances in question, to be recited below, make it quite clear that they fall within the broad language of Article XV-1(a): "Any grievance which remains unsettled after having been fully processed pursuant to the provisions of Article XIII [the three-step grievance procedure], and which involves * * * the interpretation or application of a provision of this Agreement * * * shall be submitted to arbitration upon written request of either the Union or the Company. * * *" Although conceding, for the most part, that the grievances under discussion fall *prima facie* within the "interpretation or application" clause,[2] the company claims that arbitration is barred by the language which follows soon after, in Article XV-3(b):

> "It is specifically agreed that no arbitrator shall have the authority to establish or modify any wage, salary or piece rate, or job classification or authority to decide the appropriate classification of any employee. Subject to the foregoing limitations on the authority of an arbitrator, nothing in this subsection (b) shall prevent arbitration of a grievance involving a violation of this Agreement."

National Docket No. 3830 protests the company's action in reducing the pay rate of two employees. The union claims that these employees, who had been classified as

[2] The company objects to arbitration of National Docket No. 3830 as not involving the interpretation or application of a contract provision, and to arbitration of National Docket No. 4485 as involving a matter within the sole authority of the company. We reject these contentions for the reasons set out in Judge Palmieri's opinion.

R-17 Millwrights for approximately nine years, temporarily worked in a lower classification during a heavy layoff. Thereafter, when they returned to perform the duties they had originally performed as Millwrights, they were classified merely as Machine Repairmen R-12, and paid at a lower rate. The company asserts that resolution of this grievance would require the arbitrator to determine proper wages and job classifications.

National Docket No. 4485 involves a refusal by the company to reinstate an employee as a sheet metal worker, despite his seniority rights, on the ground that he was physically unable to perform the work. The union alleges that the employee, who had worked as a sheet metal worker for approximately eight months, was laid off because of lack of work; when other employees with less seniority were recalled, he was told that he could not be placed in his former job because of his physical condition. The employee had been examined by the company's dispensary and found to be epileptic. His reclassification was effected apparently on the basis of a provision in the collective bargaining agreement: "An employee with a physical limitation as determined by the Company Dispensary will be transferred to a suitable available classification * * *." The company contends that arbitral review of its action here would require the arbitrator to determine proper job classification.

National Docket No. 4557 protests the promotion of an employee, one Haslam, to an R-14 opening despite the claim to the job by another employee, Hatch, who, the union contends, had greater seniority rights. Haslam, at one time employed within the bargaining unit represented by the union, was transferred to another job outside the unit. The union contends that upon returning to the unit he was improperly given seniority credit, despite his shift to a position outside the unit and despite the fact that the job he had previously held in the unit was no longer in

existence. The company claims, *inter alia*, that to resolve this grievance, the arbitrator would have to determine the proper classification of an employee.

National Docket No. 4665 involves the company's hiring of employees as No. 1762 Testmen, which carried an R-19 classification, but paying them merely R-16 rates. The union claims that the company's continued refusal to advance their wages runs afoul of the collective bargaining agreement, especially the progression schedules. The company defends its refusal to arbitrate by asserting that the arbitrator is without authority to establish or modify job classifications or wages, or to determine the appropriate classification of an employee.

National Docket No. 4922 protests the removal of employees from the production and maintenance unit, represented by the union, and the conversion of their jobs from hourly pay to salary without any change in their duties. It is alleged that the company's removal of the No. 8823 Crystal Processors, R-10, violated that section of the collective bargaining agreement providing for union recognition, as well as other contract provisions, and that several of the employees were later laid off in violation of their rights. The company objects to arbitration as necessarily involving the decision of appropriate job classifications.

National Docket No. 5639 involves an allegation of improper retroactive deductions from the earnings of sixteen employees who were transferred to experimental jobs. When two employees complained that their earnings on the experimental job were less than their average earnings on their regular job, the company paid them the difference. Thereafter, the company recomputed the wages of twenty-three other employees on the experimental job and found that sixteen had been earning more on that job than their average earnings on their regular job. The excess earnings were thereupon deducted from later pay checks. The grievance complains of these retroactive deductions. The

company asserts that the grievance is nonarbitrable, for the arbitrator is without authority to modify wages.

The scope of our power in determining questions of "substantive arbitrability," that is, whether the subject matter of a grievance is such as to make it properly submissible to arbitration under the agreement of the parties," has been clearly set out by the Supreme Court. "An order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage." *United Steelworkers v. Warrior & Gulf Nav. Co.*, 363 U.S. 574, 582-83 (1960). "In the absence of any express provision excluding a particular grievance from arbitration, we think only the most forceful evidence of a purpose to exclude the claim from arbitration can prevail, particularly where, as here, the exclusion clause is vague and the arbitration clause quite broad." Ibid. at 584-85. We have before us such a broad arbitration clause, bringing within its ambit all cases involving "the interpretation or application of a provision of this Agreement . . . ."[2]

Although the company asserts that all six grievances just described are rendered beyond the jurisdiction of the arbitrator by Article XV-3(b), the union contends that the

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[2] This Court, recently construing precisely such a clause, said:

> "The nub of the matter is that under the broad and comprehensive standard labor arbitration clause every grievance is arbitrable, unless the provisions of the collective bargaining agreement concerning grievances and arbitration contain some clear and unambiguous clause of exclusion, or there is some other term of the agreement that indicates beyond peradventure of doubt that a grievance concerning a particular matter is not intended to be covered by the grievance and arbitration procedure set forth in the agreement."

Procter & Gamble Independent Union v. Procter & Gamble Mfg. Co., 298 F. 2d 644, 645-46 (2d Cir. 1962).

limitations there set out upon the authority of the arbitrator do not deprive him of jurisdiction but merely circumscribe his award-making powers by restricting the remedies which he may fashion after deciding the merits of a grievance. We agree, as did Judge Palmieri, with the union's construction of the so-called exclusionary clause, and we hold therefore that none of these grievances is excluded from arbitration by virtue of its substantive nature. This conclusion is compelled by the structure of the section itself, a comparison with other provisions in the collective bargaining agreement, and an understanding of the arbitration clause in the context of labor relations between the union and the employer.

The first sentence of Article XV-3(b) limits the "authority" of the arbitrator; the second provides that subject to these limitations, all grievances involving a violation of the collective bargaining agreement are to be arbitrable. The more plausible reading of the Article on its face is therefore that all grievances involving "interpretation or application" are within the *jurisdiction* of the arbitrator, but that the arbitrator's jurisdiction must be exercised subject to the stipulated limitations upon his award-making *authority*. At the worst, this Article is ambiguous; but as we have just noted, in order that arbitration be excluded, the exclusionary clause must be "clear and unambiguous."

Any ambiguities are readily dissipated by an examination of the subsections of Article XV which surround the subsection under investigation. Article XV-3(c) states that "no provision of this Agreement * * * *shall be subject to arbitration* pertaining in any way to the establishment, administration, interpretation or application of Insurance or Pension Plans * * *." (Emphasis added.) It is clear that the parties were quite able, by the use of appropriate language, to provide for exclusion from arbitration altogether by withdrawing from the arbitrator's jurisdiction

certain specific subject matter. The use of different phraseology within the very same Article of the collective bargaining agreement cannot be ignored in the process of construction.[4] Article XV-3(a), on the other hand, uses terminology similar to that of the section here under investigation: "no arbitrator shall have any authority to add to, detract from, or in any way alter the provisions of this Agreement." This provision seems clearly to be a limitation upon the arbitrator's award-making powers, for it apparently assumes that a dispute will indeed be submitted to him. The use here of the word "authority" guides us toward a similar interpretation when it appears in the very next subsection of Article XV.

Finally, we are persuaded that Article XV-3(b) does not deprive the arbitrator of jurisdiction over these six grievances, because of the broad possibility of labor dislocation which would result from such a construction. All of the grievances under discussion are what we have called "the run-of-the-mill, garden variety of grievances commonly presented for solution by the procedures of arbitration in the modern American industrial world. * * *" *Procter & Gamble Independent Union* v. *Procter & Gamble Mfg.*

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[4] We note at this point that the cases upon which the company relies in asserting that Article XV-3(b) renders these grievances wholly nonarbitrable are cases where the exclusionary language left no doubt that arbitration was meant to be completely foreclosed. See *Communications Workers of America* v. *New York Tel. Co.*, 46 CCH Lab. Cas. ¶ 17,859 (S. D. N. Y. 1962) ("In no event shall any grievance or dispute arising out of this Section * * * be subject to the arbitration provisions of this agreement."); *Underwood Corp.* v. *Local 267, International Union of Elec. Workers*, 183 F. Supp. 205 (D. Conn. 1960) (Clark, Circuit Judge, sitting by designation) ("There may not go beyond Step 3 of the grievance procedure to arbitration any difference * * * arising under any provision of Section 16 * * *."). *But see Sunnyside Westinghouse Salaried Employees Assn.* v. *Westinghouse Elec. Corp.*, 175 F. Supp. 685 (W. D. Pa. 1959), aff'd 276 F. 2d 927 (3d Cir. 1960), the authority of which is considerably weakened by *Radio Corp. of America* v. *Association of Professional Eng'r Personnel*, 291 F. 2d 105 (3d Cir.), cert. denied, 368 U. S. 898 (1961).

Co., 298 F. 2d 644, 645 (2d Cir. 1962). To hold that such grievances were meant to be excluded from the broad arbitration provision would remove the possibility of compelled peaceful resolution of the type of grievance so pervasive today. We therefore endorse the conclusions of Judge Palmieri. — F. Supp. at

We do not say that labor and management are no longer free to retain the strike as a means of settling industrial disputes or to limit the scope of arbitration to a minimal number of issues in the collective bargaining agreement. We have recently emphasized that arbitration is not an incident of the employment relationship, but is a creature of contract between the union and the employer. See *Black-Clawson Co.* v. *International Ass'n of Machinists*, — F. 2d — (2d Cir. 1962); *Procter & Gamble Independent Union* v. *Procter & Gamble Mfg. Co.*, — F. 2d — (2d Cir. 1962). What we do say is that the canons for construing labor agreements, as set down by the Supreme Court, require that such a broad-reaching exclusion as is urged by the company should be garbed in unmistakably clear language.

The company urges that our reading of the clause limiting the arbitrator's powers renders that clause ineffectual and meaningless. We do not agree. The clause was obviously designed to prevent the arbitrator from making the type of decision which is normally reserved for the parties at the bargaining table. Thus, the arbitrator cannot establish wage rates or job classifications where none existed before and cannot modify those rates and classifications which have been hammered out at the bargaining table. Nor can he assign an unclassified employee to a particular job classification. Such remedies partake more of "legislation" than adjudication, and our reading of the limiting clause merely gives effect to the parties' apparent intention to restrain the arbitrator from exercising a legislative function. The employer argues that the arbitrator necessarily "establishes or modifies" a wage

rate or job classification whenever he declares improper some wage or job decision of the employer; in short, that there is an unauthorized "modification" whenever the arbitrator suggests a change in the status quo. We cannot adopt such a construction of the limiting clause. If a change in the status quo is necessitated by an interpretation of the collective bargaining agreement, then it is not an unauthorized modification. The employer's construction of a similar provision was recently rejected by the Court of Appeals for the Third Circuit in *Radio Corp. of America* v. *Association of Professional Eng'r Personnel*, 291 F. 2d 105, 109 (3d Cir.) cert. denied, 368 U. S. 898 (1961),[5] and *International Union of Elec. Workers* v. *Westinghouse Elec. Corp.*, 268 F. 2d 352, 355 (3d Cir. 1959).[6]

Even were we to agree with the employer's contention that certain of the grievances might result in an unauthorized "decision" as to the "appropriate classification of any employee," we do not deem that proper cause for interceding at this point. Arbitration may well contribute to industrial peace even if it results in the arbitrator's determination that he can make no valid award because of the limitations upon his authority, or that the employee has no case on the merits. In *United Steel Workers* v. *American Mfg. Co.*, 363 U. S. 564 (1960), the Supreme Court submitted to arbitration a grievance which was asserted by the employer to be clearly frivolous; one factor in its decision

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[5] "The arbitrator's ruling on this dispute as to the amount of merit increases would thus merely enforce a contractual scheme of escalation. Certainly, if a contract provided for a wage increase of 5% at the end of a year and the employer granted only a 4% increase at that time, an award of the difference could not be characterized as action changing an existing wage rate or establishing a new one."

[6] "In reaching these conclusions the arbitrator would neither be establishing new time values or modifying the present ones. He would be merely declaring what the particular actual time value situations are by correct interpretation of the existing written collective bargaining agreement."

was the "therapeutic" value which arbitration might have in the "plant environment." See 363 U. S. at 568. We cannot divine now, nor do we deem it proper to predict, the precise form in which the arbitrator will frame his decree. We merely hold that in each of the grievances under discussion, he has the jurisdiction to reach a decision on the merits. Should his decision or the remedy exceed the bounds of his authority as established by the collective bargaining agreement, that abuse of authority is remediable in an action to vacate the award. See *United Steelworkers* v. *Enterprise Wheel & Car Corp.*, 363 U. S. 593 (1960). That question "is for another day." *International Ass'n of Machinists* v. *Hayes Corp.*, 296 F. 2d 238, 244 (5th Cir. 1961).

III.

Three of the union's grievances charge conduct on the part of the employer which the employer asserts can be evaluated only by the National Labor Relations Board. It is therefore argued that exclusive jurisdiction in the Board precludes adjudication or arbitration of the grievances, under the so-called preemption doctrine. See *San Diego Bldg. Trades Council* v. *Garmon*, 359 U. S. 236 (1959); *Garner* v. *Teamsters Union*, 346 U. S. 485 (1953). Judge Palmieri found the preemption doctrine inapplicable and ordered arbitration of each grievance. We agree and affirm the relevant portion of his order.

National Docket No. 4114 protests the assignment of certain bargaining unit work, assembly work on military guidance systems, to "laboratory technicians," persons outside the bargaining unit. The laboratory technicians did the assembly work alongside of employees who were within the bargaining unit, and it is asserted that the company refused to apply to them the provisions of the collective bargaining agreement and to recognize the union as their bargaining representative.

Opinion of the United States Court of Appeals for the Second Circuit.

National Docket Nos. 4606-4611, consolidated as a single grievance, involves the assignment of work normally performed by the Maintenance Plumbers, employees within the union's bargaining unit, to employees in a different unit represented by a different union.

National Docket No. 4922, already discussed in detail, protests the removal of certain crystal processors from the production and maintenance unit and the conversion of their jobs from hourly pay to salary, without any change in their duties.

The Supreme Court has all but sounded the death-knell of the theory of exclusive NLRB jurisdiction in cases arising under section 301 of the Labor-Management Relations Act. See *Smith* v. *Evening News Ass'n*, 371 U. S. 195 (1962); *Atkinson* v. *Sinclair Refining Co.*, 370 U. S. 238, 245 n. 5 (1962); *Local 174, Teamsters* v. *Lucas Flour Co.*, 369 U. S. 95, 101 n. 9 (1962); *Dowd Box Co.* v. *Courtney*, 368 U. S. 502, 513 (1962). The Court, in *Smith* v. *Evening News Ass'n*, 371 U. S. at 197, discussed the other three cases cited above:

> "... in these cases the jurisdiction of the courts was sustained although it was seriously urged that the conduct involved was arguably protected or prohibited by the Labor Management Relations Act and therefore within the exclusive jurisdiction of the National Labor Relations Board. In *Lucas Flour* as well as in *Atkinson* the Court expressly refused to apply the preemption doctrine of the *Garmon* case; and we likewise reject that doctrine here where the alleged conduct of the employer, not only arguably, but concededly, is an unfair labor practice within the jurisdiction of the National Labor Relations Board. The authority of the Board to deal with an unfair labor practice which also violates a collective bargaining contract is not displaced by

301, but it is not exclusive and does not destroy the jurisdiction of the courts in suits under §301."

The strong emphasis, placed upon arbitration as a means of peacefully and expeditiously resolving labor disputes, in the drafting of section 301 and in its interpretation by the Supreme Court, see e.g., *Textile Workers Union* v. *Lincoln Mills*, 353 U. S. 448 (1957); *United Steelworkers* v. *Warrior & Gulf Nav. Co.*, 363 U. S. 574 (1960), might be immeasurably frustrated were it within the power of a recalcitrant party to assert that his conduct which is alleged to be in breach of contract would be also an unfair labor practice and within the sole domain of the NLRB: almost any breach of a collective bargaining agreement could successfully be garbed as an unfair labor practice. See Sovern, "Section 301 and the Primary Jurisdiction of the NLRB", 76 Harv. L. Rev. 529, 552 (1963). Congress, in refusing to make all breaches of labor contracts cognizable by the Board as unfair labor practices, see H. R. Rep. No. 510, 80th Cong., 1st Sess. 41-42, 52 (1947), contemplated that these would be resolved by the "usual processes of the law." The fact that the Board's docket is notoriously overcrowded and that Board decisions are often slow in coming, that the remedies which the Board may fashion are often inflexible,[7] that time limitations or jurisdictional restrictions may effectively eliminate the possibility of administrative action, and that the grant of a hearing in any event is wholly within the discretion of the General Counsel of the Board—all of these factors are incompatible with an assertion that courts or arbitrators must necessarily be deprived of jurisdiction over disputes which in some form or other trench upon the possible, but as yet unexercised, use of power by the National Labor Relations Board. See *Lodge 12, Int'l Ass'n of Machinists* v. *Cameron*

[7] See Dunau, "Contractual Prohibition of Unfair Labor Practices: Jurisdictional Problems," 57 Colum. L. Rev. 52, 68-72 (1957).

Iron Works, Inc., 257 F. 2d 467 (5th Cir.), cert. denied, 358 U. S. 880 (1958); Dunau, "Contractual Prohibition of Unfair Labor Practices: Jurisdictional Problems", 57 Colum. L. Rev. 52 (1957); Meltzer, "The Supreme Court, Congress, and State Jurisdiction Over Labor Relations: II", 59 Colum. L. Rev. 269, 281-95 (1959); Sovern, *supra*.[8]

The fear of possible conflict with the NLRB can easily be exaggerated. The arbitrator himself might reject an interpretation of the contract which would permit the company to do or force it to do what the Board would enjoin. It is also clear that the mere rendition of an arbitration award in no way precludes the Board from exercising jurisdiction over the same subject matter upon the filing of a complaint alleging an unfair labor practice.[9] Moreover, the Board has exercised its discretion so as to forestall the possibility of abrasive conflicts between itself and the agencies responsible for the enforcement of section 301. Although not bound by the arbitrator's award, the Board will often defer to an award already rendered unless the arbitration procedure has been unfair or irregular, or the arbitrator's decision is repugnant to the purpose and policies of the labor act. See *International Harvester Co.*, 138 N.L.R.B. No. 88 (1962);[10] *Spielberg Mfg. Co.*, 112

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[8] See also *United Steelworkers* v. *New Park Mining Co.*, 273 F. 2d 352 (10th Cir. 1959); *United Elec. Workers* v. *Worthington Corp.*, 236 F. 2d 364 (1st Cir. 1956); *Independent Petroleum Workers* v. *Esso Standard Oil Co.*, 235 F. 2d 401 (3d Cir. 1956); *Textile Workers Union* v. *Arista Mills Co.*, 193 F. 2d 529 (4th Cir. 1951); Note, 59 Colum. L. Rev. 153, 168-71 (1959); Note, 69 Harv. L. Rev. 725 (1956).

[9] The Board's power to define and prevent unfair labor practices "shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise * * *." 29 U. S. C. § 160(a); section 10(a) of the Labor-Management Relations Act. See *Lodge 12, Int'l Ass'n of Machinists* v. *Cameron Iron Works, Inc.*, 257 F. 2d at 473; *United Elec. Workers* v. *Worthington Corp.*, 236 F. 2d at 367-68.

[10] "If complete effectuation of the federal policy [favoring arbitration] is to be achieved, we firmly believe that the Board, which is entrusted with the administration of one of the many facets of

N.L.R.B. 1080 (1955). And where arbitration is an available, but as yet unutilized, remedy for the resolution of problems arguably within the domain of the Board, that agency may choose not to exercise its jurisdiction until the contractual remedies have been exhausted. See *McDonnell Aircraft Corp.*, 109 N.L.R.B. 930, 934-35 (1954); *Crown Zellerbach Corp.*, 95 N. L. R. B. 753 (1951); *Consolidated Aircraft Corp.*, 47 N.L.R.B. 694, 706 (1943), enforced as modified, 141 F. 2d 785 (9th Cir. 1944). See also Dunau, 57 Colum. L. Rev. at 59-64; Wollett, "The Interpretation of Collective Bargaining Agreements: Who Should Have Primary Jurisdiction?", 10 Lab. L. J. 477 (1959); Levitt, "Interrelationships in the Interpretation of Collective Bargaining Agreements," 10 Lab. L. J. 484 (1959). In short, the virtues of "coordinate" jurisdiction of the court, the arbitrator, and the Board far outweigh the projected, and practically infrequent, vices. Rather than clash, the private interests advanced in the arbitral forum and the public interest advanced in the administrative forum, are far more likely to be complementary.

The company asserts that even if the preemption doctrine is not generally applicable in cases under section 301, the doctrine should apply where the questions raised by the grievances deal with the scope of the bargaining unit and similar matters of employee representation. It is true that only the Board can conclusively define the scope of the bargaining unit, just as the Board is the authority for the definition of unfair labor practices. But an arbitrator, in determining whether a party has violated the collective

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national labor policy, should give hospitable acceptance to the arbitral process as 'part and parcel' of the collective bargaining process itself,' and voluntarily withhold its undoubted authority to adjudicate alleged unfair labor practice charges involving the same subject matter, unless it clearly appears that the arbitration proceedings were tainted by fraud, collusion, unfairness, or serious procedural irregularities or that the award was clearly repugnant to the purposes and policies of the Act."

bargaining agreement, does not define an unfair labor practice; nor need he necessarily, in construing the employer's contractual obligation to recognize the union as the bargaining agent in the unit delineated by the Board, define that unit or alter its scope. The grievances under examination, and the contract provisions which will have to be interpreted in the course of arbitration, are quite familiar in the context of work-assignment disputes. See, e.g., *Procter & Gamb. Independent Union* v. *Procter & Gamble Mfg. Co.*, 298 F. 2d 644 (2d Cir. 1962); *International Tel. & Tel. Corp.*, v. *Local 400, Int'l Union of Elec. Workers*, 286 F. 2d 329 (3d Cir. 1960). We are not persuaded that the possibility of some form of future conflict between the arbitrator's interpretation and a finding by the National Labor Relations Board in the area of representational disputes is so much more unsettling than in other areas as to call for a different result.[11]

In short, we hold that the possibility *vel non* of an exercise of jurisdiction by the Board is irrelevant in the circumstances before us. It was therefore unnecessary for Judge Palmieri to examine the merits of one of the grievances, National Docket Nos. 4606-4611, in order to determine whether the NLRB could be seised of jurisdiction over the purported jurisdictional dispute. It was not beside the point, however, for him to note that the only way the Board's jurisdiction could have been invoked was for the union to engage in an unfair labor practice proscribed by section 8(b)(4)(D); this simply points up the need for a peaceful, channelized, and expeditious means of settling

[11] We are confirmed in our conclusion by the fact that Congress, in section 303 of the Labor-Management Relations Act, 29 U. S. C. §187, has expressly carved out an exception to the purported exclusive jurisdiction of the NLRB by permitting the courts to adjudicate suits against unions for violations of section 8(b)(4) of the act, 29 U. S. C. §158(b)(4)(D). The latter section imposes restrictions upon the union's power in the area of work assignment disputes, among other activities.

work-assignment disputes, one which is not dependent upon the commission of unlawful acts and upon an often slow-footed exercise of discretion by an already burdened administrative agency. Although the ideal solution of this grievance would bring both conflicting unions before a single tribunal, see Sovern, 76 Harv. L. Rev. at 573-77, arbitration between one of them and the employer may nonetheless be a force for industrial peace.[12]

IV.

Judge Palmieri refused to direct the arbitration of National Docket No. 4557, reasoning that the clause of the collective bargaining agreement upon which it was founded is unlawful, and that to direct the employer to submit to

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[12] *See Freight Drivers & Helpers* v. *Quinn Freight Lines, Inc.*, 195 F. Supp. 180 (D. Mass. 1961). Although we disagree with the broad language of the Court of Appeals for the First Circuit, in *Local 1505, Int'l Bhd. of Elec. Workers* v. *Local 1836, Int'l Ass'n of Machinists*, 304 F. 2d 365 (1st Cir. 1962), cert. granted, 31 L. S. L. Week 3151 (U. S. Nov. 19, 1962), that Court noted that "resolution of an ambiguity in its certification is a matter exclusively for the Board in spite of the fact that preemption, as such, does not apply to actions under section 301 * * *," of situations such as that before us, where the certification is unambiguous, the Court expressly reserved decision. *See* 304 F. 2d at 367 n. 2. We have learned that counsel in that case have entered into a settlement agreement, requesting that the Supreme Court remand the case and order that the complaint be dismissed. Other decisions arguably contrary to that we reach here have come only from the District Courts. *See International Chem. Workers Union* v. *Olin Mathieson Chem. Corp.*, 202 F. Supp. 363 (S. D. Ill. 1962); *Local 1357, Retail Clerks Int'l Ass'n* v. *Food Fair Stores, Inc.*, 202 F. Supp. 322 (E. D. Pa. 1961); *In re American Business, Inc.*, 151 F. Supp. 877 (D. Neb. 1957). We note in passing, that even though the possibility of some future presentation of the representation issue to the NLRB should not forestall the courts from directing arbitration, it is not at all inconsistent for a court to defer its judgment should the Board already be seised of jurisdiction over a complaint by one of the parties to the contract. See note, 59 Colum. L. Rev. at 170.

arbitration would in effect compel the commission of an unfair labor practice. The union, on cross appeal, challenges the propriety of this phase of the district judge's order. National Docket No. 4557, as already noted, involves an assertion by employee Hatch that employee Haslam was improperly appointed to a vacancy to which he, Hatch, had prior claim because of seniority. The union asserts that by giving Haslam seniority, the employer has run afoul of Article XI(3) of the collective bargaining agreement:

> "Employees who have been or may be transferred to jobs outside the bargaining unit may be returned to their former classification in the bargaining unit in accordance with total length of continuous service. Employees in any plant who have been certified in a bargaining unit not covered by this Agreement shall have no rights under this Agreement."

Judge Palmieri held this provision unlawful because designed "to preserve seniority rights of employees who leave the unit but do not join another union, while denying this privilege to employees who do join another union." In deciding that this discriminatory effect gave rise to an unfair labor practice, Judge Palmieri relied upon *NLRB* v. *International Ass'n of Machinists*, 279 F. 2d 761 (9th Cir.), cert. denied, 364 U. S. 890 (1960).

We hold that the withdrawal of this grievance from arbitration was premature, and that it, along with all other grievances brought before us on this appeal, must be submitted to arbitration. As we understand the grievance, the union contends in part that Haslam was returned to the bargaining unit in a new position at a time when his former position was no longer in existence; this is said to render inoperative the seniority clause because Haslam was not "returned to • • • [his] former classification in the bar-

gaining unit * * *." Surely this raises a question of contract interpretation meet for decision by the arbitrator. And the reasons for the inapplicability of the preemption doctrine require that arbitration be compelled here also. It will provide a ready means of healing the disruptive relationship between union and management; not only will it resolve questions going to the merits of the collective bargaining agreement, but as we have already said, it may have the "therapeutic values" of which the Supreme Court spoke in *United Steelworkers* v. *American Mfg. Co.*, 363 U. S. 564, 568 (1960). Even if we were to assume the NLRB's position to be so clear as Judge Palmieri thought, conflict with its policies is here wholly conjectural. It is by no means clear that the union's grievance will be found warranted. Further, if the arbitrator does uphold the union's construction of the seniority provision in question, he might himself decline to fashion an award based upon it for fear that he would encourage a practice banned by the labor act. We cannot construct a framework of legal principles governing arbitration on the theory that the arbitrator is ignorant or oblivious of the pronouncements of the Board and the courts. As another alternative which would not run afoul of the act, but would indeed further its purposes, the arbitrator might decide that the second sentence, which arguably discriminates against those anxious to exercise rights protected by the act, is severable and should be discarded but that the union's claim is supportable under the first sentence.

Only if none of these approaches is adopted by the arbitrator would it become necessary to determine whether a court should enforce an award that clearly commands an unfair labor practice. To do so now would be to "raise an unfair labor practice question prematurely and gratuitously." Wollett, "The Interpretation of Collective Bargaining Agreements: Who Should Have Primary Juris-

diction?", 10 Lab. L. J. 477, 482 (1959) (suggesting that even the Board should stay its hand until the arbitrator has given an authoritative interpretation of the contract).

In sum, we affirm those portions of the district court's order requiring arbitration of all grievances alleged to fall without the contractual authority of the arbitrator, all grievances alleged to fall within the exclusive jurisdiction of the National Labor Relations Board, and all "procedural" issues to be determined before reaching the merits. We reverse those portions of the order withholding from arbitration certain procedural issues which the Court itself determined, as well as the grievance the arbitration of which is said to compel the commission of an unfair labor practice.

Judgment of the United States Court of Appeals for the Second Circuit.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the eleventh day of March one thousand nine hundred and sixty-three.

Present:

HON. HENRY J. FRIENDLY,
HON. IRVING R. KAUFMAN,
HON. THURGOOD MARSHALL,
Circuit Judges.

JAMES B. CAREY, as President of International Union of Electrical, Radio and Machine Workers, AFL-CIO,
Petitioner-Appellant,

v.

GENERAL ELECTRIC COMPANY,
Respondent-Appellant.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is modified in accordance with the opinion of this Court and as so modified said order be and it hereby is affirmed with costs to the petitioner-appellant.

A. DANIEL FUSARO,
Clerk.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962

GENERAL ELECTRIC COMPANY, *Petitioner*,

v.

JAMES B. CAREY, AS PRESIDENT OF INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO, *Respondent*.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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INDEX

	Page
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Statutes Involved	3
Statement	3
A. The Proceedings	3
B. The Arbitration Agreement	3
C. The Grievances and the Challenges to Their Arbitrability	4
1. Grievances Challenged Because of Alleged Failure to Adhere to the Procedures Set Forth in the Grievance and Arbitration Provisions	4
2. Grievances Challenged on the Ground That the Limitation on the Authority of the Arbitrator Excluded Them from Arbitration	6
3. Grievances Challenged on the Ground That They Are Within the Exclusive Jurisdiction of the National Labor Relations Board	8
4. Grievance Challenged on the Ground That the Award Sought Would Be Unlawful	9
Argument	10
Introduction	10
A. There Is No Conflict of Decisions Which Warrants Grant of the Petition with Respect to the Procedural Objections to Arbitration	10
B. The Construction of Article XV, 3(b) of the Agreement as a Limitation on the Award Making Authority of the Arbitrator Raises No Issue of Importance	13
C. The Decision Below That Arbitration Was Not Preempted by the Jurisdiction of the National Labor Relations Board Raises No New Issue of Importance	14

Page

D. No Important Question of Federal Law Is Raised by Petitioner's Other Objections to Arbitration 16

Conclusion 19

Table of Cases

Bethlehem Steel v. *S.L.R.B.*, 330 U.S. 767 17

Boston Mutual Life Insurance Co. v. *Insurance Agents Int'l. Union*, 258 F. 2d. 516 (C.A. 1) 11

Brass & Copper Workers v. *American Brass Co.*, 272 F. 2d. 849 (C.A. 7) 11

Carey v. *Westinghouse*, 11 N.Y. 2d. 452, No. 485, Oct. Term, 1962 13, 16

Deaton Truck Line v. *Local 612*, 314 F. 2d. 418 (C.A. 5) 11

Employing Plasterers Ass'n., 118 NLRB 17 15

General Aniline & Film Corp., 89 NLRB 407 15

International L & W Union v. *Juneau Spruce Corp.*, 342 U.S. 237 15

International Association of Machinists v. *Hayes Corp.*, 296 F. 2d. 238 (C.A. 5) 17

International Union of Electrical, Radio & Machine Workers v. *General Electric Co.*, 174 Atl. 2d. 298 18

IUE v. *Westinghouse*, 268 F. 2d. 352 (C.A. 3) 13

Livingston v. *John Wiley & Sons, Inc.*, 313 F. 2d. 52 (C.A. 2), cert. granted May 13, 1963 (No. 934, Oct. Term, 1962) 11, 12

Local 174, Teamsters v. *Lucas Flour Co.*, 369 U.S. 95 18

Local 748 Electrical, Radio & Machine Workers v. *Jefferson City Cabinet Co.*, 314 F. 2d. 192 (C.A. 6) 11

Local 1505, Int'l. Brotherhood of Electrical Workers v. *Local 1836, Int'l. Assn. of Machinists*, 304 F. 2d. 365 (C.A. 1) 15

McDonnell Aircraft Corp., 109 NLRB 930 15

Plumbing Contractors Ass'n., 93 NLRB 1081 15

Radio Corp. of America v. *Association of Prof. Eng. Personnel*, 291 F. 2d. 105 (C.A. 3), cert. den. 368 U.S. 898 11, 13

Retail Clerks v. *Lion Drygoods, Inc.*, 369 U.S. 17 15

Page

Retail Clerks Union, Local 770 v. *Thriftimart, Inc.*, ——— Cal. ———, 47 CCH. Lab. Cas. § 18,214 15
Smith v. *Evening News Ass'n.*, 371 U.S. 195 14
Straight Line Foundry & Machine Corp. v. *Wojcik*, 9 N.Y. 2d. 867 14
United Steelworkers v. *American Mfg. Co.*, 363 U.S. 564 10
United Steelworkers v. *Enterprise Wheel & Car Corp.*, 363 U.S. 593 10, 17
United Steelworkers v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574 10

OTHER AUTHORITIES

Cox, *Reflections Upon Labor Arbitration*, 72 Harv. L. Rev. 1482. 12
House Conf. Rep. No. 510 on H.R. 3020, 1 Leg. Hist. of L.M.R.A., 1947, p. 565 14

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962

No. 1,070

GENERAL ELECTRIC COMPANY, *Petitioner*,

v.

JAMES B. CAREY, AS PRESIDENT OF INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO, *Respondent*.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

Opinions Below

The opinion of the Court of Appeals is reported 315 F. 2d 499 and is printed with the Petition (A. 36-60).[1] The opinion of the District Court is reported at 213 F. Supp. 276 (A. 3-35).

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[1] Figures in parenthesis, unless otherwise indicated, when preceded by "A" refer to the Appendix to the Petition; when preceded by "it" they refer to pages in Appendices below. Numbers followed by the letter "a" refer to Appellant's appendix below; those followed by the letter "b" refer to Appellee's appendix.

Jurisdiction

The jurisdiction of this Court is invoked by virtue of 28 U.S.C. § 1254(1), 62 Stat. 928.

Questions Presented

1. In an action to compel arbitration pursuant to a collective bargaining agreement which provides that a court shall direct arbitration of grievances raising issues concerning the interpretation or application of the agreement, are objections based on the alleged failure of the Union to follow procedures set forth in the grievance and arbitration provisions to be referred to the arbitrator.

2. Whether where a contract provides that no arbitrator shall have authority to establish or modify wages, salary or piece rates or job classifications or to decide the appropriate classification of any employee, the Court below erred in construing this provision of the agreement to be a limitation on the award-making power of the arbitrator and not a clear and unambiguous exclusion of grievances from arbitration.

3. Whether a court may enforce arbitration of grievances which allege that the employer has violated its agreement by assigning work covered by the collective bargaining agreement to employees outside the collective bargaining unit and refusing to apply the terms and provisions of the agreement to the performance of such work.

4. Whether the right to arbitrate a particular grievance may be made to turn upon a prediction that the arbitrator may direct the performance of an illegal act?

5. Whether the provision that the agreement shall be governed by the law of the State of New York requires the application of legal principles other than those enunciated by the court below.

Statutes Involved

In addition to Sections 9(b) and 301 of the Labor Management Relations Act, 1947, referred to in the Petition at pp. 3-4, consideration of the merits of the third question presented would also involve Sections 8(b)(4)(D), 9(c), and 10(k) of that Act. (61 Stat. 140-146, 73 Stat. 525, 542, 29 U.S.C. § 158-160)

Statement

A. *The Proceedings*

Respondent, sometimes referred to herein as "Union", instituted a proceeding in the New York Supreme Court on October 24, 1961, to compel arbitration of the twelve grievances involved herein. Petitioner, sometimes referred to herein as "Company", removed the proceedings to the District Court for the Southern District of New York, where, after answer and upon the Union's motion, an order was entered on April 19, 1962, directing the Petitioner to arbitrate all but one of the grievances.

Upon appeal and cross-appeal, the United States Court of Appeals for the Second Circuit, on March 11, 1963, directed that all the grievances should be arbitrated. Still not content, the Company seeks to delay further the arbitral process with respect to all the grievances by the instant petition for a Writ of Certiorari.

B. *The Arbitration Agreement*

The arbitration agreement, contained in Article XV Section 1 of the collective bargaining agreement, provides that any grievance not settled in the grievance procedure (Article XIII) shall be submitted to arbitration if it involves "the interpretation or application of a provision of this agreement" or a disciplinary penalty alleged to

have been imposed without just cause. (R. 40a-43a). Section 2(b) of Article XV provides that if either party advises the American Arbitration Association that a *grievance* does not, in its opinion, raise an arbitrable issue, the Association will process a request for arbitration of such grievance only after a final judgment of a court finding that the grievance "raises arbitrable issues" and directing arbitration. Utilizing this provision, the Company challenged the arbitrability of all the grievances here involved, and the Association suspended the processing of requests for their arbitration.

C. *The Grievances and the Challenges to Their Arbitrability*

The grievances are grouped according to the grounds advanced by petitioner to bar them from arbitration. Because Petitioner's statement of the grievances fails to indicate the questions of fact and interpretation which raise arbitrable issues in each of the grievances, it is necessary to restate them more clearly.

1. Grievances Challenged Because of Alleged Failure to Adhere to the Procedures Set Forth in the Grievance and Arbitration Provisions.

(a) In *National Docket Nos. 4910 and 4928*, the Union charged that Petitioner violated the agreement by placing junior employees on jobs in violation of its contractual obligation to assign them to the grievants, who were senior employees. In each case, the grievance was filed as soon as the grievant learned that the job had been assigned to the junior employee. (R. 51a-52a, 53a-54a).

The Company contends that these grievances are not arbitrable because they were not filed "within a reason-

able time after the occurrence *or knowledge* of the situation, condition or action of Management giving rise to the grievance. . . ." (Article XIII, 2(a)(1), R. 9a-10a, emphasis added).

(b) *National Dockets Nos. 3979 and 3971*, charged that two stewards were improperly denied "top seniority" in violation of Article XII, Section 1(b), of the collective bargaining agreement and then laid off. These grievances were held in abeyance at Step Two within the grievance procedure to await the outcome of a pending arbitration proceeding between the parties involving the identical issue. Within two weeks after the awaited award was rendered, the Union proceeded to Step Three of the grievance procedure. The Company contends that the grievances are not arbitrable because submitted to this step "more than three months after" its consideration at Step 2. (Art. XII, 2(c), R. 11a, 56a).

(c) In *National Docket Nos. 4910, 4928, 4665, 5039, 4922, 4451 and 4606-4611*, the Company challenged the arbitrability of each of the grievances on the ground, among others, that, though the Union requested arbitration within the time prescribed in the arbitration agreement, (Article XV, 1, R. 41a), it did not comply with a subsequent provision of the same Article (Article XV, 2(a)) because it failed within ten days after the request for arbitration, to request the American Arbitration Association to submit a panel of names from which an arbitrator may be chosen. The Rules of the Association provide that a panel of names will be submitted to the parties without such a request. The parties have in the past relied upon the Rules, which are embraced in the agreement. (R. 41a, 1b-6b).

Each of these grievances raises arbitrable issues con-

cerning the interpretation and application of the Agreement. Nos. 4454, 4910, and 4928 involve the assignment of jobs to junior employees in lieu of recall of laid off senior employees pursuant to the agreement. Nos. 4665 and 5039 involve the failure to compensate employees as required. Nos. 4606-4611 and 4922 involve assignment of bargaining unit work to non-bargaining unit employees.

The Court below rejected all the aforesaid challenges on the ground that the questions raised by the Company were for the arbitrator, and not the Court to decide.

2. Grievances Challenged on the Ground That the Limitation on the Authority of the Arbitrator Excluded them from Arbitration.

(a) *National Docket No. 4665* complained that the Company paid certain Testmen at rates of pay lower than their rate of pay as set forth in the Job Manual and failed to advance them as required by the Progression Schedule. (R. 58a).

(b) *National Docket No. 3830* claimed that the Company recalled two millwrights rated at the R-17 rate of pay to their jobs but paid them at the lower R-12 rate. (R. 59a).

(c) *National Docket No. 5039* charged that the Company had improperly deducted from the earinings of a group of employees a sum equivalent to the difference between the amount they had previously earned on a special rate while working on an experimental job and the base pay guaranteed to them on the experimental job. (R. 61a-62a).

(d) *National Docket No. 4922* charged that, in violation of the agreement, the Company had shrunk the

coverage of the agreement by converting the job of Crystal Processing from an hourly rated job within the contract unit to a salaried job and unilaterally removed it from the coverage of the contract though "there was no change in the duties, functions or supervision of the employees involved." (R. 64a).

(e) *National Docket No. 4557* complained that the Company had given a job to one employee in violation of the seniority rights of another employee. (R. 69a-70a).

(f) *National Docket No. 4485* complained that the Company had discharged an employee by refusing to recall him because its dispensary had determined that he was "an epileptic." (R. 46a, 25a).

The Company contends that none of these grievances is arbitrable because of Article XV, 3(b) of the agreement which provides:

> "It is specifically agreed that no arbitrator shall have the authority to establish or modify any wage, salary or piece rate, or job classification, or authority to decide the appropriate classification of any employee. *Subject to the limitations on the authority of an arbitrator, nothing in this subsection (b) shall prevent arbitration of a grievance involving a violation of this Agreement.*" (R. 81a, emphasis supplied).

The Union disputed that the relief requested in any of the grievances required the arbitrator to exceed the limitations on his authority.

The Court of Appeals construed Article XV, 3(b) to be a limitation on the award-making power of the arbitrator and not an exclusion of these grievances from the arbitration agreement contained in Article XV 1(a).

3. Grievances Challenged on the Ground that they Are Within the Exclusive Jurisdiction of the National Labor Relations Board.

(a) *National Docket Nos. 4606-4611* complained that the work of the maintenance plumbers consisting of hooking up and unhooking plumbing connections in the plant, traditionally performed by the plumbers in the bargaining unit, had been assigned to machinist repairmen when they were performing other work on machines which were to be connected or disconnected to hydraulic systems (R. 72a). Neither the machinists nor their Union made a claim that the work belonged to them. The machinists are in a different bargaining unit and are not covered by the instant collective bargaining agreement.

(b) *National Docket No. 4114* complained that the Company had brought in a group of "laboratory technicians" who were outside the bargaining unit to do assembly work alongside of assemblers covered by the agreement. The Company refused to apply the agreement to those "laboratory technicians." (R. 66a-68a).

(c) *National Docket No. 4922* charged that the Company had improperly removed crystal processers from the coverage of the contract. (R. 64a).

The Company challenged arbitrability on the ground that these grievances "invade the province of exclusive National Labor Relations Board jurisdiction."

The Court of Appeals, applying the principle of *Smith v. Evening News Ass'n*, 371 U.S. at 197 (A. 52) and citing *H.R. Rep. No. 510, 80th Cong. 1st Sess.* 41-42, 52, (1 Leg. Hist. of L.M.R.A. 1947, at p. 556) held that in an action to compel arbitration under Section 301(a), "the possibility

vel non of an exercise of jurisdiction by the Board is irrelevant" (A. 56).

4. Grievance Challenged on the Ground that the Award Sought Would Be Unlawful

In *National Docket No. 4557* the Union complained that an employee, Haslam, was hired for a vacancy in a bargaining unit job, but that another employee, Hatch, was entitled to the job by virtue of seniority. Haslam had, at a prior time, worked in a classification in the bargaining unit. He then transferred to a salaried job out of the covered bargaining unit. The R-14 vacancy for which Haslam was subsequently rehired into the unit was not within the classification formerly held by Haslam. Indeed, the classification he had previously held no longer existed. (R. 69a-70a).

The grievance involves the interpretation and application of Article X(3) of the agreement which reads as follows:

> "Employees who have been or may be transferred to jobs outside the bargaining unit *may be returned to their former classification* in the bargaining unit in accordance with total length of continuous service. Employees in any plant who have been certified in a bargaining unit not covered by this Agreement shall have no rights under this Agreement." (R. 69a-70a, emphasis supplied).

The Company contended that the grievance was not arbitrable because an award which applied the second sentence of the quoted provision would be unlawful.

The court below held that the grievance raised a question of the interpretation and application of this provision for the arbitrator, whose award cannot be presumed in advance to entail a violation of the law.

ARGUMENT

Introduction

The Petition in this case is an ideal illustration of the ease with which arbitration can be transformed from an easy, informal, and expeditious way to resolve employee grievances into a distant goal to be reached only by way of a long, arduous, and costly judicial proceeding. Each of the grievances is a "run-of-the-mill garden variety" grievance commonly presented for solution by arbitration (A. 48). Unless the grounds for court intervention to obstruct arbitration are tightly confined, as this Court has already indicated they are to be,[2] the purposes of arbitration will be subject to ready frustration through the device of conjuring up a multiplicity of obstructive reasons not to arbitrate. By denying certiorari in this case and avoiding any extension of the accumulated delays in the grievances here involved, this court can confirm its intent to deny recalcitrant parties the use of the courts as an instrument of delay, and through delay, avoidance of the fulfillment of contractual rights and obligations.

A. There Is No Conflict of Decisions Which Warrants Grant of the Petition With Respect to the Procedural Objections to Arbitration.

The first question raised by the Petition is whether, where the parties have agreed that a court shall direct arbitration of grievances which raise issues involving the interpretation and application of their collective bargaining agreement, disputes over asserted failures to adhere to pro-

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[2] *United Steelworkers v. American Mfg. Co.*, 363 U.S. 564; *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574; *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593.

cedures set forth in the grievance and arbitration provisions of the agreement are to be resolved by the courts or by an arbitrator. Contrary to Petitioner's assertion, there is no conflict among the circuits on this question.

Since this Court rendered its decisions in the *Steelworkers* cases,[3] three United States Courts of Appeals and Court of Appeals of New York have been in agreement with the court below that such issues are for an arbitrator to decide where the contract provides merely that issues concerning interpretation and application of the contract are arbitrable.[4] The asserted conflict is between these decisions on the one hand and two pre-*Steelworkers* Circuit Court decisions which involved similar contract provisions.[5]

The contract provisions in this case differ from those in the cases in which the asserted conflict exists. Here the parties have specifically provided by their contract that the role of the courts is to be limited to a determination "that the grievance upon which arbitration has been requested raises arbitrable issues," Art. XV, 2(b). Thus, consideration of issues raised by the grievance is separated from questions of compliance with the grievance procedure. If a grievance involves the interpretation or application of the Agreement, by its terms arbitrable issues have been raised. Once the court has determined that a grievance

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[3] See footnote 2 above.

[4] *Livingston* v. *John Wiley & Sons, Inc.*, 313 F. 2d 52 (C.A. 2), cert. granted May 13, 1963 (No. 934, Oct. Term, 1962); *Radio Corp. of America* v. *Association of Prof. Eng. Personnel*, 291 F. 2d 105 (C.A. 3); *Denton Truck Line* v. *Local 612*, 314 F. 2d 418 (C.A. 5); *Local 748*; *Electrical, Radio & Machine Workers* v. *Jefferson City Cabinet Co.*, 314 F. 2d 192 (C.A. 6); *Straight Line Foundry & Machine Corp.* v. *Wojcik*, 9 N.Y. 2d 867. Contrary to Petitioner's assertion, certiorari has not been granted in the *Jefferson City Cabinet* case, and the petition is pending at present.

[5] *Boston Mutual Life Ins. Co.* v. *Insurance Agents Int'l Union*, 258 F. 2d 516 (C.A. 1); *Brass & Copper Workers* v. *American Brass Co.*, 272 F. 2d 849 (C.A. 7).

raises arbitrable issues, its role is ended. The grievance is plainly subject to arbitration, and any remaining objections are to be raised in that forum.[6]

Even on the broader question which exists where the court's role is not provided in the agreement, the post-*Steelworkers* holdings faithfully implement the decisions of this Court in the *Steelworkers* cases and properly limit the judicial function to an examination of the arbitration clause to determine whether the grievance comes within its scope and is not expressly excluded from arbitration. They properly held that a dispute over the application of a provision of the grievance procedure is itself a dispute within the scope of the arbitration clause which embraces "interpretation or application" of a provision of the agreement. See Cox, *Reflections Upon Labor Arbitration*, 72 Harv. L. Rev. 1482, at p. 1511, cited in *Warrior*.

Until such time as a circuit court reaches a decision in square conflict with those of the Second, Third, Fifth and Sixth Circuits, notwithstanding the *Steelworkers* principles, review by this Court is not needed.[7]

The grant of certiorari by this Court in *Livingston* v. *John Wiley & Sons, Inc.* 313 F. 2d 52 (No. 934 October Term, 1962, May 13, 1963) does not warrant a similar grant of a writ on the question here presented. That case presents an overriding issue, not present here, as to the arbitrability of the coverage of the agreement. Moreover, the contract

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[6] The Company's attempt to turn this provision to its advantage, by asserting without demonstration that it shows that the contract contemplates determination of preliminary questions by the court, blandly ignores the contract definition of the preliminary questions which the court is to consider.

[7] Those decisions of district courts which are in conflict with the decision here involved reveal a preoccupation with the inapposite common law of commercial contracts, and are not consonant with the principles enunciated by this Court in the *Steelworkers* cases. This Court does not sit to review decisions of district courts.

provisions in the instant case limit the court's role in this case, regardless of the outcome of the *Livingston* case.

B. The Construction of Article XV, 3(b) of the Agreement as a Limitation on the Award Making Authority of the Arbitrator Raises No Issue of Importance.

The second issue raised in the Petition is merely a question of the interpretation to be given Article XV, 3(b) of the Agreement. This question is virtually identical to the second question which Respondent in this case sought to raise in its Petition in *Carey* v. *Westinghouse*, No. 485, October Term, 1962, which the Company here asserts is in conflict with the court below. That this Court denied certiorari as to that question, while granting it as to the other question raised in that case, confirms that such questions of contract construction do not warrant consideration on certiorari.

The decision below is in harmony with decisions of the Third Circuit.[8] No decision of a United States Court of Appeals is in conflict with it.

The court below properly construed Article XV, 3(b) in accordance with the admonition of this Court in *Warrior & Gulf*, supra. There is no "forceful evidence of a purpose to exclude" grievances from arbitration in this provision. Article XV, 3(b) presupposes arbitration; it does not preclude it. When the parties intended to write an exclusion clause they knew how to do it; they excluded the insurance and pension plans from arbitration by express, unambiguous language in the very next subdivision of Article XV, 3. As the Court below found, this reading does not render the limitation on the arbitrator's powers meaningless, nor does it

[8] *I.U.E.* v. *Westinghouse*, 268 F. 2d 352 (C.A. 3); *Radio Corporation of America* v. *Associated Professional Engineering Personnel*, 291 F. 2d 10 (C.A. 3); cert. den. 368 U.S. 898.

make it impossible for him to render a meaningful award if he finds merit in the grievances. (A. 47-48).

Carey v. *Westinghouse*, *supra*, on which Respondent relies is a state court decision which is in clear conflict with the Third Circuit *Westinghouse* decision, for both *Westinghouse* cases involved the same contract provisions. If that conflict did not warrant a grant of certiorari in *Carey*, clearly certiorari is unwarranted in this case.

C. The Decision Below that Arbitration Was Not Preempted By the Jurisdiction of the National Labor Relations Board Raises No New Issue of Importance.

The third question raised in this case relates to the arbitrability of work assignment grievances. The Company contends that these grievances may give rise to some issues over which the National Labor Relations Board might assert jurisdiction and that the Board, therefore, has exclusive jurisdiction over them.

The decision of the court below is in accord with *Smith* v. *Evening News Ass'n.*, 371 U.S. 195. It is also in accord with the legislative intent of Section 301(a). "The conference agreement makes clear that when two remedies exist, one before the Board and one before the courts, *the remedy before the Board shall be in addition to, and not in lieu, of other remedies*": House Conf. Rep. No. 510 on H.R. 3020, p. 52, 1 Leg. Hist. of L.M.R.A., 1947, at p. 556.

The principle of *Smith*, *supra*, applies even more forcefully to a representation question, which, before the NLRB, brings on but a fact finding, non-adversary proceeding resulting in no cease and desist order. The expertise of the Board in a representation case is no greater than an unfair labor practice case. Section 301(a) does not depend upon the representation provisions of the Act nor upon the unfair

labor practice provisions Cf. *Retail Clerks v. Lion Dry-goods, Inc.*, 369 U.S. 17; *International L & W Union v. Juneau Spruce Corp.*, 342 U.S. 237.

Since *Smith*, the Supreme Court of California in *Retail Clerks Union, Local 770 v. Thriftimart, Inc.*, ——— Cal. ———, 52 LRRM 2935, 47 CCH. Lab. Cas. ¶18,214, followed *Smith*, and held that in a Section 301(a) action the jurisdiction of the court is not displaced by the jurisdiction of the NLRB to remedy unfair labor practices or to designate appropriate bargaining units.

There is no conflict here with *Local 1565, Int'l Bhd. of Elec. Workers v. Local 1836, Int'l Assn. of Machinists*, 304 F. 2d 365 (C.A. 1). In that case, which was decided before *Smith*, this Court vacated the judgment and remanded the case with direction to dismiss the complaint because it was moot (No. 419, October Term, 1962, March 18, 1963).

We have assumed up to this point that the three work assignment grievances here involved may present issues which fall within the NLRB jurisdiction. But it is not at all certain that the Board would adopt the view of the Company and consider these grievances to involve representation or certification questions. The Board recognizes the distinction between certification matters and work assignment disputes which are to be resolved through the grievance and arbitration procedures. *McDonnell Aircraft Corp.*, 109 NLRB 930. *See also General Aniline & Film Corp.*, 89 NLRB 407; *Plumbing Contractors Ass'n.*, 93 NLRB 1081; *Empoqina Plasterers Ass'n.*, 118 NLRB 17.

In each of the grievances which the Company refuses to arbitrate on this ground, there is an identifiable pure work assignment question which is grist in the mills of arbitrators.

While it is true that this Court has granted certiorari with respect to a similar issue raised by the *contrary* deci-

sion in *Carey* v. *Westinghouse*, 11 N.Y. 2d 452, No. 485, this Term, there is nothing in the nature of the issue or in this case which necessitates a grant of certiorari herein to provide a further vehicle for consideration of the issue. Moreover, as correctness of the decision below is clearly indicated, it is earnestly urged that the pending of the *Westinghouse* case not be permitted to delay a prompt denial of certiorari in this case so that the arbitration of the several grievances involved herein, many of which are completely unrelated to this issue, will not be further frustrated.

D. No Important Question of Federal Law Is Raised By Petitioner's Other Objections to Arbitration.

1. Petitioner's third question arises out of simple seniority grievance. Contrary to Petitioner's assertion, the relief requested is not in violation of the law and the Court below did not assume that it was. As the Court below found, there are a number of alternative dispositions of the grievance available to the arbitrator, which do not even touch upon the basis of the Company's assertion of illegality.[9] At least one would grant the Union the relief requested.

The possibility that an arbitrator may issue an illegal award is no different from the possibility that he may exceed his authority. Indeed, even where a contract is lawful on its face, the possibility always lurks that an arbitrator may be persuaded to grant discriminatory or other unlawful relief. In each case, this Court has clearly charted the course.

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[9] An arbitrator "might decide that the second sentence . . . is severable and should be discarded but that the union's claim is supportable under the first sentence," the legality of which is not under attack. (A-59).

The principles of the *Steelworkers* case leave no doubt that the role of the court is minimal, and that it is the arbitrator's judgment and not that of the court for which the parties have bargained. "The federal policy of settling labor disputes by arbitration would be undermined if courts had the final say on awards." *Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, at 596.

Whether or not an award should be enforced after arbitration if its legality is in doubt, clearly it is a flagrant breach of the *Steelworkers'* principles for a court to decide in advance of arbitration that an arbitrator will render an unlawful award and thus have "the final say." As this Court has held, "the power to decide a matter can hardly be made to depend on the way it is decided." *Bethlehem Steel* v. *S.L.R.B.*, 330 U.S. 767. Whether the award will be enforceable is a question "for another day." *International Association of Machinists* v. *Hayes Corp.*, 296 F.2d 238, 244 (C.A.5).

The court below had no difficulty in rejecting the Company's invitation to have it adjudicate the merits of the grievance, and nothing short of a major reversal of Congressionally announced policy would warrant a different result. Clearly this question raises no substantial issue.

2. Petitioner's fourth question is based on its contention that the lower court did not give effect to Article XV, 4 of the Agreement (R.43a) which provides that New York law shall govern the agreement. The Company complains that the Court of Appeals "ignored this question" (p. 25 of the Petition) but concedes that the District Court faced and disposed of this question.

The Company does not say what the law of New York is in respect of the construction of the arbitration clause in

this agreement, or even that the New York law is different from the federal law. Nor does the Company present any argument to show that under New York law any of the grievances are not arbitrable.

The short of the matter is that in a Section 301(a) action, the New York law is the same as the federal law, as the District Court held. *Local 174, Teamsters v. Lucas Flour Co.*, 369 U.S. 95. *See Int. Union of Electrical, Radio & Machine Workers v. General Electric Co.*, 174 Atl. 2d 298. Unless the agreement was to be construed as freezing New York law as of the time of the contract, a construction specifically rejected by the District Court (A8), it is immaterial whether the law applied is labeled Federal or New York. The propriety of the construction of the contract clearly does not warrant certiorari.[10]

[10] It may be inquired why, if Petitioner believed that federal law and New York law differ and that New York law is applicable, it elected to remove the proceeding from the New York Supreme Court where it was commenced by Respondent to the United States District Court on the ground that Section 301 conferred jurisdiction on the federal courts. Query also whether its insistence that New York law governs this agreement is inconsistent with its assertions elsewhere in its petition that the decision raises important questions of federal law.

Conclusion

For the reasons set forth above, the petition for a writ of certiorari should in all respects be denied.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

Docket No. ~~1,070~~ 114

GENERAL ELECTRIC COMPANY,

Petitioner,

against

JAMES B. CAREY, as President of International Union of Electrical, Radio and Machine Workers, AFL-CIO,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

REPLY BRIEF FOR PETITIONER IN SUPPORT OF GRANTING THE WRIT.

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REPLY BRIEF FOR PETITIONER IN SUPPORT OF GRANTING THE WRIT.

The questions here presented both in the petition for a writ (pp. 2-3) and in Respondent's brief (p. 2) are substantial and important. Respondent's brief (p. 2) has undertaken to restate the questions presented. While the substance of their statement of the questions is not greatly different than ours, we prefer to rest upon our own statement.

Respondent's initial argument against granting the writ that it would extend "the accumulated delays" (brief, p. 10) has a hollow ring, especially in view of the fact that the Union delayed for periods of over two years in seeking to have a court direct arbitration of certain of these grievances (R. pp. 58a, 61a, 67a, 68a) in spite of the fact

that such action is mandated by the contract of the parties where there is a dispute over arbitrability.

The most important question in this case is how far the federal law will go to imply an agreement to arbitrate where the parties have hedged their contract with provisions designed to restrict the areas of arbitrability.

The parties herein are in fundamental disagreement as to the function of the court in cases arising under Section 301(a) of the Labor Management Relations Act, 1947. Respondent, brushing aside the terms on which the parties agreed to arbitrate, regards a court's function as merely rubber stamping a case "To arbitration" once it is determined that there is *any* agreement to arbitrate and that the Union claimed that the Company had violated one or more provisions of the agreement.

It seems worth while to point out that nowhere in the National Labor Relations Act is there a declaration of national policy in favor of arbitration. On the contrary, in Section 203(d), Congress provided as follows:

> "(d) Final adjustment by a *method agreed upon by the parties* is hereby declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective bargaining agreement." (Italics ours)

Of course it is still the law, as has been reiterated by *all* the cases on the subject up to the present day, that parties are not bound to arbitrate except as they have agreed to do so, and that it is for the court to determine whether the particular dispute sought to be arbitrated is one which the parties have agreed to arbitrate, and whether the reluctant party has breached its agreement to do so.

This does not mean that the court's sole function is the routine one of passing the decision on to the arbitrator. The court has a judicial function; and it must be exercised judicially.

True, the courts have set their faces against attempts, in the guise of raising questions regarding the jurisdiction of the arbitrator, to persuade the court to decide the merits of the controversy. But this does not mean that where, as in the case at bar, the question has been squarely presented whether the controversy is one which has been expressly excluded from the competency of the arbitrator, the court is impotent to rule on that question.

The Petitioner contends that the expressed intention of the parties as to what and under what conditions they will arbitrate is controlling and that it is the court's duty to analyze the contract to determine whether the parties agreed to arbitrate a given dispute. Expressed in the words of *Atkinson* v. *Sinclair Refining Co.*, 370 U. S. 238 at page 241, "... whether or not the company was bound to arbitrate, as well as what issues it must arbitrate, is a matter to be determined by the Court on the basis of the contract entered by the parties."

In Answer to Respondent's Arguments.

A. The question whether Petitioner has breached its agreement to arbitrate includes and is dependent upon the question whether Respondent has or has not complied with conditions precedent to its right to compel arbitration. Accordingly, in our view it must be determined by the Court. The grant of certiorari in *Livingston* v. *John Wiley & Sons, Inc.* (No. 934 October Term, 1962) to review this question reinforces the view that the writ should be granted here.

Respondent's brief (pp. 10-12) acknowledges the existing split in the Circuits, the conflict in district court decisions and the grant of certiorari in the *Wiley* case (313 F. 2d 52).

Fundamentally it is still the court's function to determine whether the parties have agreed to submit a matter to an arbitrator and whether the reluctant party has breached its agreement to do so. The *Steelworkers* cases do not purport to change that principle. If the parties have required compliance with conditions precedent before a matter can reach the arbitration forum, the agreement to arbitrate cannot be held to have been breached without a finding that the agreed conditions precedent to arbitration have been complied with. Since whether an agreement to arbitrate has been made and has been breached is for the court, it would follow that compliance with conditions precedent to arbitrate is not to be decided in the arbitration forum.

Since this question is presently before this Court in *Wiley*, this Court should have the benefit of Petitioner's views on this matter.

B. The construction of Article XV 3(b) of the Agreement providing that no arbitrator shall have authority to decide certain matters, fixes the boundaries of the arbitration promise. The fact that this question has come up before this Court three times and that certiorari was denied on this question in the recent *Carey* v. *Westinghouse* case (11 N. Y. 2d 452, No. 485, October Term, 1962) indicates that the question is one of importance. The denial of certiorari in *Westinghouse* left in effect a final decision directly contrary to the Court of Appeals holding herein.

Respondent acknowledges (App. 13-14) that this very issue has been before this Court on two prior separate occasions [*Carey* v. *Westinghouse* (cited in the heading) and *Radio Corporation of America* v. *Associated Professional Engineering Personnel*, 291 F. 2d 105 (Cir. 3), cert. den. 368 U. S. 898]. The fact that this is the third appear-

ance of this issue before this Court emphasizes the importance of the problem that requires this Court's solution. The disparity of treatment of this provision by the federal and state courts in New York, we submit, makes it imperative that this problem be resolved rather than have parties relegated to shopping for forums.

C. The contention that arbitration of certain grievances was preempted by the jurisdiction of the National Labor Relations Board raises no new issue of importance is disproved by *Local 1050, Int'l Bhd. of Elec. Workers* v. *Local 1836, Int'l Assn of Machinists*, 304 F. 2d 365 (Cir. 1) and the grant of certiorari in *Carey* v. *Westinghouse*, 11 N. Y. 2d 452 (No. 485).

The very fact that the issue is presently before this Court (pp. 14-16) in *Carey* v. *Westinghouse* would indicate that Petitioner herein should be permitted to present its arguments and this Court should have the benefit of such arguments.

Respondent's request for discriminatory treatment between Petitioner and a different company reviewing a like question before this Court is completely devoid of reason. It arbitrarily seeks Petitioner's preclusion from the benefit of the review by this Court of the issue.

D. The Respondent's contention that "No important question of federal law is raised by Petitioner's other objections to arbitration" is without foundation.

1. The Respondent's position (pp. 16-17) that no important question of federal law is raised where it seeks to compel arbitration for an unlawful result carries the theory that "the role of the court is minimal" (Respondent's brief, p. 17) to a *reductio ad absurdum*. To support this position Respondent has inaccurately quoted and misapplied a sen-

tence in *Bethlehem Steel Co.* v. *SLRB*, 330 U. S. 767 (1947) at 775. That case involved entry by the State Labor Board into a case within the exclusive jurisdiction of the National Board. This Court held that the State Board had no jurisdiction. In answer to the supposition that the State Board might reach the same result as the National Board, this Court said, "But the power to decide a matter can hardly be made dependent on the way it is decided." This is not authority for Respondent's position—it is, in fact, authority directly to the contrary; for it is a holding that where the only decision within its jurisdiction that a tribunal can make is a decision *one way* then it has no jurisdiction to make any decision at all. Moreover, Article XV 2(b) of the instant agreement provides that if either party advises the American Arbitration Association (the body designated to implement arbitration under the agreement) that no arbitrable issue is raised, the Association cannot proceed to process the arbitration until a court has finally determined that there are arbitrable issues "and has directed arbitration of such issues". This provision makes evident that such questions are to be determined before, *not after*, arbitration has been had. If arbitration cannot result in an effectual award, then, it is evident that under the parties' agreement arbitration must be denied.

2. The provision of the contract that New York law is applicable has meaning and importance. Under the present law of New York the arbitration agreement is subject to the same rules of construction as any other contract. There is no presumption of arbitrability. This limited proposition was not passed on by *Teamsters Local 174* v. *Lucas Flour Co.*, 369 U. S. 95 (1962). None of the cases cited bear on this proposition. Certainly the parties

could have provided that there shall be "no presumption of arbitrability". The provision that New York law governs stands for this very point. It is the present difference between the federal and state law.

Conclusion.

The Petitioner respectfully reiterates that the petition for a writ of certiorari should be granted.

Dated: June 10, 1963.

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